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WEIGHING SOCIETY'S NEED FOR EFFECTIVE LAW ENFORCEMENT AGAINST AN INDIVIDUAL'S RIGHT TO LIBERTY: *Swinney v. State* AND THE FORTY-EIGHT HOUR RULE

*Mark J. Goldberg**

I. INTRODUCTION

On October 31, 2002, the Mississippi Supreme Court in *Swinney v. State*,[1] held that a forty-three hour delay between an individual's arrest and initial appearance before a judicial officer was reasonable.[2] This determination led the court to reject Vickie Swinney's ("Swinney") argument that the forty-three hour delay was unconstitutional and resulted in Swinney's conviction for capital murder and aggravated assault being upheld.[3] The United States Supreme Court's decision in *County of Riverside v. McLaughlin*,[4] was used to resolve the issue of reasonableness in Swinney's delayed initial appearance.[5] The *McLaughlin* opinion provided that a Fourth Amendment violation could occur if an individual was detained after a warrantless arrest for an unreasonable amount of time without a judicial determination of probable cause to support the arrest.[6] *McLaughlin* was an attempt by the Supreme Court to clarify *Gerstein v. Pugh*,[7] in which the term "prompt" was used to define when judicial determinations of probable cause must be held after warrantless arrests to satisfy the Fourth Amendment.[8]

One issue raised by the Mississippi Supreme Court's ruling in *Swinney* is whether *McLaughlin*'s holding was misapplied since an example of an unreasonable delay provided in *McLaughlin*,[9] was substantially analogous to the justification for law enforcement's delay of Swinney's initial appearance.[10] Another issue presented by the *Swinney* decision is whether incriminating statements made by Swinney should have been suppressed if the delay between her arrest

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1. 829 So. 2d 1225 (Miss. 2002).
2. *See id.* at 1232.
3. *Id.* at 1228. Swinney had argued that the delay resulted in the deprivation of her right to counsel provided by the Sixth Amendment of the United States Constitution and Article Three, Section Twenty-Six of the Mississippi Constitution. *Id.* at 1230. Consequently, she sought to have her statements made to law enforcement before her initial appearance, without an attorney, suppressed. *Id.*
4. 500 U.S. 44 (1991).
5. *Swinney*, 829 So. 2d at 1231-32 (citing *McLaughlin*, 500 U.S. at 56-57).
6. *See McLaughlin*, 500 U.S. at 55-57 (providing a time limit in which judicial determinations of probable cause within forty-eight hours of a warrantless arrest would be presumptively reasonable while those occurring after the passage of forty-eight hours would only be found to not violate a suspect's rights if the government could prove an actual emergency or exigent circumstance for the delay).
7. 420 U.S. 103 (1975).
8. *See McLaughlin*, 500 U.S. at 47 (citing *Gerstein*, 420 U.S. 103).
9. *See id.* at 56 (stipulating that an individual's rights may be violated if a probable cause determination is held within forty-eight hours of arrest but still delayed for the goal of amassing additional evidence to support the arrest).
10. *See Swinney*, 829 So. 2d at 1232 (agreeing with the circuit judge's opinion in which the delay for Swinney's initial appearance, for the purpose of determining whether Swinney could be charged with an additional crime, was reasonable).

and initial appearance was found to be unreasonable.[11] Furthermore, should the Mississippi Supreme Court have even used *McLaughlin* to resolve the initial appearance issue in *Swinney*, since the facts of the opinion did not expressly indicate whether Swinney was arrested pursuant to a warrant? If Swinney was arrested pursuant to a warrant, *McLaughlin*'s holding, requiring judicial determinations of probable cause, could not have been violated since arrest warrants represent such findings.[12]

This Note will seek to analyze and resolve the above mentioned issues presented by *Swinney*. Also, the history and origin of *Gerstein/McLaughlin* Fourth Amendment violations will be traced through United States Supreme Court precedent. Furthermore, how various courts such as the Supreme Court, United States Courts of Appeals, and Mississippi Supreme Court have applied the *Gerstein/McLaughlin* analysis will be examined.

II. FACTS AND PROCEDURAL HISTORY

A. Facts Leading to Arrest and Trial

Swinney, along with her brother Nicholas Swinney ("Nicholas"), entered a pawn shop at 2:15 p.m. on the day of November 17, 1997.[13] At the time, the shop's owner, Don Harville ("Harville"), as well as two customers were present in the store.[14] After approximately twenty minutes the two customers left the store leaving Nicholas and Swinney alone with Harville.[15] Swinney then let Harville inspect two of her rings and when Harville went to weigh the jewelry, Swinney produced a gun and shot him in the back.[16] Subsequently, another customer, William Morrison ("Morrison"), came into the store and found Harville lying on the floor.[17] Morrison then attempted to call 911 from inside the store, but after hearing a gunshot, he ran towards the front entrance and was struck from behind by gunfire.[18]

At trial there was conflicting testimony as to what occurred after Morrison fell outside of the doorway.[19] Morrison testified that he observed Swinney pull out a pistol from a car after she ran out of the pawnshop and saw that he was still

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11. The Fourth Amendment requires judicial determinations of probable cause before prolonged detention of individuals, *Gerstein*, 420 U.S. at 114, and the Supreme Court has held that evidence obtained through violations of the Fourth Amendment is inadmissible. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

12. *Cf.* United States v. Van Metre, 150 F.3d 339, 347-48 (4th Cir. 1998) (noting that the defendant's arraignment was delayed in excess of forty-eight hours; but, since the defendant was arrested through the use of a warrant, *McLaughlin*'s Fourth Amendment holding was inapplicable); Lawrence v. State, 869 So. 2d 353, 356 (Miss. 2003) (finding no Fourth Amendment violation under *Gerstein/McLaughlin* since an arrest warrant was served the day after an arrest, representing a judicial finding of probable cause).

13. *Swinney*, 829 So. 2d at 1229.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *See id.*

moving.[20] However, Scott and Teresa Crum, two witnesses observing the events occurring outside the shop, testified that a thin black man had the gun and not Swinney.[21] One of the first customers in the store had identified Swinney as the shorter sibling, and Nicholas as the taller of the two.[22] Nicholas and Swinney were subsequently arrested at a police roadblock that same afternoon, and a 9-millimeter handgun was found in their car while two 9-millimeter bullets were found in Swinney's pocket after she was taken to jail.[23]

At approximately 5:00 p.m. on the day of the robbery and arrest, November 17, 1997, Swinney was questioned by Billy Clyde Burns, a Captain in the Corinth Police Department.[24] At this initial questioning Swinney stated that her brother Nicholas had the gun, and at no time did she fire the weapon.[25] However, on November 19, 1997, at approximately 9:00 a.m. Swinney provided a conflicting statement in response to questioning by Ralph Dance, a district attorney's office investigator.[26] Swinney subsequently claimed that she accidentally shot Harville in the back in an attempt to unjam her gun, which she pulled out after Harville had turned to weigh her rings.[27] This statement was not recorded and Swinney would not sign the statement after Investigator Dance had written it down.[28] Also, this second statement provided the only direct evidence that Swinney had shot Harville in the back.[29]

B. Trial Court Procedure

In the Circuit Court of Alcorn County Swinney was convicted for the capital murder of Harville and the aggravated assault of Morrison.[30] Swinney was "sentenced to life in prison without the possibility of parole," for the murder of Harville and to twenty years in prison for Morrison's aggravated assault with both sentences to run consecutively.[31] In a preliminary proceeding Swinney filed a motion to suppress her statements made to Investigator Dance, which had implicated her in Harville's death.[32] Swinney claimed the statements were inadmissible because, they resulted from an unreasonable delay between her arrest and initial appearance before a judge, they were obtained through a violation of her right to an attorney, and they were coerced by threats.[33]

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 1229-30.
24. *Id.* at 1230.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 1232.
30. *Id.* at 1228.
31. *Id.*
32. *See id.* at 1229.
33. *Id.*

While rejecting Swinney's claim of coercion without making any findings of fact, the circuit judge also denied the motion to suppress on Swinney's unreasonable delay argument due to her being afforded an initial appearance within forty-eight hours of arrest,[34] in compliance with Mississippi's Initial Appearance Rule 6.03.[35] The jury's guilty verdict was entered by the circuit court on December 10, 1998, and Swinney's motion for a new trial or alternatively, judgment notwithstanding the verdict, was denied on December 15, 1998.[36]

C. Swinney I

Swinney's appeal was first decided by the Mississippi Supreme Court on March 1, 2001.[37] The main argument in Swinney's appeal was that her initial appearance before a judge was unreasonably delayed and this lead to incriminating statements being taken from her, which violated her right to counsel.[38] Swinney claimed the delay was unnecessary and in violation of Rule 6.03,[39] because law enforcement was ready, and a circuit court judge was available for her arraignment on November 18.[40] Therefore, when the district attorney's office requested the arraignment be postponed until November 19, for the purpose of investigation, an unreasonable delay occurred.[41] Consequently, the statements made to law enforcement on the morning of November 19, after the unreasonable delay and before her initial appearance, were taken in violation of Swinney's federal and state right to counsel and should have been suppressed.[42]

In deciding this issue the court relied upon the United States Supreme Court's decision in *McLaughlin* and Rule 6.03, which together required an arrested person to have an initial appearance within forty-eight hours of arrest, and without unnecessary delay.[43] The court further defined "'without unnecessary delay' to mean 'as soon as custody, booking, administrative and security needs have been met.'"[44] Moreover, the court noted once the administrative

34. *Id.*

35. MISS. R. UNIF. CIR. CTY. CT. 6.03 ("Every person in custody shall be taken, without unnecessary delay and within 48 hours of arrest, before a judicial officer . . . [and] if the arrest has been made without a warrant, the judicial officer shall determine whether there was probable cause for the arrest . . . ," and if the judicial officer does not find probable cause to support the warrantless arrest, the accused must be released.). Rule 6.03 replaced Rule 1.04 on May 1, 1995, which did not contain a specific forty-eight hour requirement, but instead required an initial appearance "without unnecessary delay[;]" and, Rule 6.03 was designed to reflect the United States Supreme Court's forty-eight requirement provided in *McLaughlin*. *Swinney*, 829 So. 2d at 1231.

36. *Swinney*, 829 So. 2d at 1229.

37. Swinney v. State, No. 1999-KA-00031-SCT, 2001 Miss. LEXIS 45 (Miss. Mar. 1, 2001), *withdrawn and substituted by*, 829 So. 2d 1225.

38. *Id.* at **1-2. Swinney also claimed that the trial court erred by not admitting exculpatory portions of her statements to police, while admitting the incriminating portions. *Id.* at **19-20. Furthermore, she alleged the trial court erred in not providing a circumstantial evidence instruction as to the robbery charge, *id.* at *24, and in not directing a verdict as to the robbery due to a lack of evidence. *Id.* at **22-23.

39. MISS. R. UNIF. CIR. CTY. CT. 6.03 (*see supra* note 35).

40. *Swinney*, 2001 Miss. LEXIS 45, at **8,12.

41. *See id.* at *8.

42. *See id.* (citing U.S. CONST. amend. VI; MISS. CONST. art. 3, § 6).

43. *See id.* at **9, 11.

44. *Id.* at *11 (quoting Evans v. State, 725 So. 2d 613, 644 (Miss. 1997) (citing Abram v. State, 606 So. 2d 1015 (Miss. 1992))).

needs of law enforcement had been met, the only excusable reason for delay would be the unavailability of a judge to conduct an initial appearance.[45] The court also provided that an initial appearance may be unconstitutional when held within forty-eight hours of arrest if a defendant could prove the appearance was delayed either for an illegal purpose,[46] or for a purpose unrelated to the administrative needs of law enforcement.[47]

From applying the facts of Swinney's arrest, detention, and questioning to the above mentioned legal requirements the court found Swinney's initial appearance to be unnecessarily delayed.[48] In doing so the court rejected the trial judge's conclusion that delay for the purpose of investigating what crimes to charge an arrestee with was permissible.[49] To allow delays for this purpose would give law enforcement too much latitude and allow them to take statements from detainees, determine the truthfulness of those statements through investigation, and subsequently confront those accused with any inconsistencies in their statements, while delaying an initial appearance which provides an accused with counsel.[50] In Swinney's case, her second round of questioning occurred after her initial appearance was postponed from November 18, to November 19.[51] Investigator Dance testified that the purpose of this questioning was to confront Swinney with discrepancies between her initial statements and evidence found through further investigation.[52] Therefore, Swinney's initial appearance before a judicial officer was delayed for an impermissible purpose.[53]

The result of this finding was that Swinney was entitled to counsel when she made incriminating statements to Investigator Dance on November 19, 1997, before her initial appearance, because the right to counsel adheres at the time the initial appearance should have been held.[54] However, since Swinney gave a voluntary and knowing waiver of her right to counsel before making incriminating statements, her confession was admissible.[55] Based on this holding and the rejection of Swinney's other arguments on appeal the court affirmed Swinney's conviction for capital murder and aggravated assault.[56] On motion for rehearing,

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45. *Id.* (citing *Abram*, 606 So. 2d at 1029).

46. *Id.* at **11-12 ("such as 'gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.'") (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991)).

47. *Id.* at *12 (citing *Evans*, 725 So. 2d at 644).

48. *See id.* at **13-14.

49. *See id.*

50. *See id.* at *13.

51. *See id.* at **13-14.

52. *See id.*

53. *Id.* at *14.

54. *Id.* (citing Jimpson v. State, 532 So. 2d 985, 988 (Miss. 1988) (quoting May v. State, 524 So. 2d 957, 967 (Miss. 1988))).

55. *Id.* at *25.

56. *Id.* at **25-26. The Court also held that the trial judge's decision to not admit the exculpatory portions of Swinney's statements given to authorities, while admitting the incriminating portions, was erroneous; but, the error was harmless since Swinney failed to prove that the error prejudiced the outcome of the trial. *Id.* at *22. Also, there was no error in the circuit court's refusal to grant Swinney a directed verdict per the robbery count, or in the refusal to administer a circumstantial evidence instruction to the jury because there was sufficient direct evidence to support the robbery conviction. *See id.* at **22-25.

October 31, 2002, the court again affirmed Swinney's conviction for capital murder and aggravated assault, but subsequently found the delay between Swinney's arrest and initial appearance to be reasonable.[57]

III. BACKGROUND AND HISTORY OF THE LAW

Since the Mississippi Supreme Court in *Swinney* relied upon *McLaughlin* to resolve the issue of unreasonable delay,[58] United States Supreme Court precedent leading to and including *McLaughlin* will be examined. Also, how the United States Circuit Courts of Appeals have interpreted and applied *McLaughlin*'s holding will be discussed. Furthermore, Mississippi Supreme Court opinions involving *McLaughlin* claims will be analyzed. In addition, decisions addressing violations of Mississippi's Initial Appearance Rule 6.03,[59] that influenced the *Swinney* court will be provided.

A. The Fourth Amendment and Gerstein v. Pugh

The issues before the United States Supreme Court in *Gerstein* were whether an individual could be arrested and detained until trial without a judicial finding of probable cause and if not, whether the judicial finding of probable cause had to be in the form of an adversarial hearing to satisfy the Constitution.[60] The Court resolved these issues through a Fourth Amendment analysis and held that prompt judicial determinations of probable cause were a prerequisite to prolonged detention, but the determinations did not have to reach the level of an adversarial hearing.[61] However, the Court did not specifically define "prompt," which lead to the issue before the Court in *McLaughlin*.[62]

Pugh and Henderson were both arrested and detained in Dade County, Florida, in March 1971.[63] Neither was released before trial, Pugh because of the severity of his crime and Henderson because he could not afford bail, and both were formally charged by prosecutorial information approximately two weeks after their initial arrest.[64] Therefore, both men were detained for a significant period of time without a judicial determination of probable cause.[65] Subsequently, Pugh and Henderson brought a class action in United States District Court under 42 U.S.C. § 1983, against Dade County seeking injunctive and declarative relief in the form of a determination of probable cause.[66]

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57. Swinney v. State, 829 So. 2d 1225, 1228, 1232 (Miss. 2002).
58. *See id.* at 1231.
59. MISS. R. UNIF. CIR. CTY. CT. 6.03.
60. Gerstein v. Pugh, 420 U.S. 103, 112 (1975).
61. *See id.* at 126.
62. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 47 (1991).
63. *Gerstein*, 420 U.S. at 105.
64. *Id.* at 105, 105 n.1. Also, there was no indication that either man was arrested pursuant to a warrant. *Id.* at 105 n.1.
65. *See id.*
66. *Id.* at 106-07, 107 nn.5-6. Furthermore, neither detainee sought release from their pretrial confinement. *Id.* at 107 n.6.

The district court "held that the Fourth and Fourteenth Amendments [gave] all arrested persons charged by information a right to a judicial hearing on the question of probable cause."[67] Dade County was then ordered to give Henderson and Pugh a preliminary hearing so that probable cause could be determined in order to support their further confinement.[68] Also, the district court ordered Dade County to provide a plan in which all cases brought by information would require preliminary hearings.[69] However, on appeal the United States Court of Appeals for the Fifth Circuit stayed the order; and, when the Florida Supreme Court changed the rules controlling preliminary hearings statewide, the case was remanded so that the district court could determine whether the new statewide procedures were constitutional.[70] Ultimately the district court held, and the Fifth Circuit affirmed, that the new procedures were unconstitutional since an individual could still be charged by information and detained without a judicial finding of probable cause.[71]

On certiorari, the Supreme Court first determined whether judicial findings of probable cause were constitutionally required for extended pretrial detention.[72] In doing so, the Court noted that the Fourth Amendment and common-law precedent were the bases for procedural standards pertaining to arrests and detentions.[73] Also, the Court explained that arrests must be supported by probable cause,[74] which symbolized a proper balance between a person's right to freedom and the government's duty to limit crime.[75] Furthermore, in order to ensure the Fourth Amendment's protections against unreasonable searches and seizures, neutral magistrates were required to make findings of probable cause whenever possible.[76] However, since law enforcement would be too severely burdened by a per se requirement of judicial determinations of probable cause before all arrests, the Court noted warrantless arrests backed by probable cause should not be invalidated.[77]

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67. *Id.* at 107.

68. *Id.* at 107-08.

69. *Id.* at 108 (The adopted plan required arrested individuals to be brought before a judicial officer upon arrest for a hearing in which probable cause would be determined, charges against the accused would be explained, the accused would be read his rights, and appointed counsel if indigent.).

70. *See id.* at 109. The new rules provided by the Florida Supreme Court required all arrested individuals to be afforded a first appearance before a magistrate within twenty-four hours of arrest; but, did not require a probable cause determination to be made at this appearance. *Id.* (citing FLA. R. CRIM. P. 3.130(b)). Also, those charged by indictment or information would not be provided any preliminary hearings. *Id.* (citing FLA. R. CRIM. P. 3.131; *In re* Rule 3.131(b), 289 So. 2d 3 (Fla. 1974)).

71. *See id.* at 109-10 (citing Pugh v. Rainwater, 355 F. Supp. 1286 (S.D. Fla. 1973), *aff'd*, 483 F.2d 778 (5th Cir. 1973)).

72. *See id.* at 110-11.

73. *Id.* at 111 (citing Cupp v. Murphy, 412 U.S. 291, 294-95 (1973); *Ex Parte* Bollman, 8 U.S. 75 (1807); *Ex parte* Burford, 7 U.S. 448 (1806)).

74. *Id.* at 111-12 (citing Beck v. Ohio, 379 U.S. 89, 91 (1964); Henry v. United States, 361 U.S. 98 (1959); Brinegar v. United States, 338 U.S. 160, 175-76 (1949)).

75. *Id.* at 112.

76. *See id.* at 112-13 (citing Johnson v. United States, 333 U.S. 10, 13-14 (1948); Terry v. Ohio, 392 U.S. 1, 20-22 (1968)).

77. *See id.* at 113 (citing Ker v. California, 374 U.S. 23 (1963); Draper v. United States, 358 U.S. 307 (1959); Trupiano v. United States, 334 U.S. 699, 705 (1948)).

From weighing society's need for effective law enforcement against individuals' needs for liberty, and applying the preceding legal principles, the Court determined that a law enforcement officer's finding of probable cause would be sufficient to justify a brief detention of a person in order to take the administrative steps necessary to an arrest.[78] Nevertheless, the Court also held that a judicial finding of probable cause was required by the Fourth Amendment for extended periods of detention following arrest.[79] Several historical sources were then cited by the Court to support its Fourth Amendment holding and to show how the common law required arrested individuals to be brought before judges promptly after arrest.[80]

After finding that judicial determinations of probable cause were required by the Fourth Amendment, the Court rejected the Florida State Attorney's argument that prosecutorial determinations of probable cause were sufficient to detain an individual until trial.[81] The Court then approvingly cited the legal principle in which illegal arrests or detentions would not negate subsequent convictions.[82] Finally, the Court turned to the issue of whether judicial findings of probable cause had to be in the form of adversarial proceedings.[83]

In finding that adversarial safeguards were not necessary in judicial determinations of probable cause to justify pretrial detention the Court noted how the probable cause standard for arrest was the same as the standard for pretrial detention.[84] Consequently, since an informal, nonadversarial proceeding before a magistrate was most often used for the issuance of arrest warrants, the same type of proceeding would suffice for pretrial detentions.[85] The addition of certain procedural safeguards, such as cross-examination, might improve the accuracy of probable cause findings in certain cases; however, in the vast majority of cases the costs to the criminal justice system would outweigh the benefits of

78. *See id.* at 113-14.

79. *See id.* at 114 (reasoning that once an individual is arrested and detained the reasons to dispense with judicial determinations of probable cause become nonexistent (danger of a suspect committing other crimes while a warrant is sought), while the need to have independent findings of probable cause increase (the economic and social burdens pretrial confinement can have on an individual)).

80. *Id.* (citing Carroll v. United States, 267 U.S. 132, 149 (1925); Kurtz v. Moffit, 115 U.S. 487, 498-99 (1885); 2 M. HALE, PLEAS OF THE CROWN 77, 81, 95, 121 (1736); 2 W. HAWKINS, PLEAS OF THE CROWN 116-17 (4th ed. 1762)).

81. *See id.* at 116-19, 117 n.19 (citing Albrecht v. United States, 273 U.S. 1, 5 (1927) (invalidating an arrest warrant based upon an information provided by a United States Attorney); Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971) (providing that a detached and neutral magistrate's constitutional role was not compatible with a prosecutor's relationship with law enforcement); Shadwick v. City of Tampa, 407 U.S. 345 (1972) ("[P]robable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution."); United States v. United States District Court, 407 U.S. 297, 317 (1972); *but cf. Ex parte* United States 287 U.S. 241, 250 (1932) (noting that a grand jury indictment is a proper determination of probable cause and would support the issuance of a warrant for a suspect's arrest)).

82. *Id.* at 119 (citing Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886)). This statement may be considered dictum since neither Pugh nor Henderson sought release from custody or a reversal of convictions, but only injunctive relief in the form of probable cause determinations. *See id.* at 107 n.6. Also, neither *Frisbie*, nor *Ker*, involved allegations of Fourth Amendment violations.

83. *See id.*

84. *Id.* at 120.

85. *See id.*

adding trial-like procedures to Fourth Amendment findings of probable cause.[86] Also, probable cause determinations are not critical stages in a prosecution that would require the appointment of counsel because of their limited function and nonadversarial character.[87]

The Court then explained that individual states should determine the specific timing and nature of probable cause hearings to support pretrial detention in order to allow for experimentation and flexibility in their varied systems of criminal justice.[88] However, to satisfy the requirements of the Fourth Amendment, a state "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."[89] The Supreme Court's lack of specificity in designating a timing requirement for probable cause determinations in *Gerstein*, lead the Court to address that exact issue sixteen years later in *McLaughlin*.

B. The Forty-Eight Hour Requirement: County of Riverside v. McLaughlin

In *County of Riverside v. McLaughlin*, the Supreme Court addressed the issue of what specific amount of time could be considered "prompt," and therefore satisfy the Court's Fourth Amendment holding in *Gerstein*.[90] This issue required resolution due to a split in the circuit courts, with the Fourth, Seventh, and Ninth Circuits requiring judicial findings of probable cause immediately after administrative measures following arrest;[91] and, the Second Circuit interpreting *Gerstein* to allow for flexibility in the timing of probable cause determinations.[92] Ultimately, the Court held that a judicial finding of probable cause made within forty-eight hours of a person's arrest would generally satisfy *Gerstein* and the Fourth Amendment.[93]

Donald Lee McLaughlin ("McLaughlin"), brought an action under 42 U.S.C. § 1983, in August 1987 against the County of Riverside, California ("County"), challenging the legality of the County's procedure for providing probable cause determinations to those subjected to warrantless arrests.[94] At the time, the County's policy was to provide arraignments in which probable cause determinations were made for those subjected to warrantless arrests, without undue delay and within forty-eight hours of arrest.[95] However, this forty-eight hour

86. *See id.* at 122, 122 n.23 (explaining that adding adversarial procedures to all judicial determinations of probable cause resulting in pretrial detention would increase, rather than lessen, pretrial delays).

87. *Id.*

88. *See id.* at 123.

89. *Id.* at 124-25.

90. County of Riverside v. McLaughlin, 500 U.S. 44, 47 (1991).

91. *Id.* at 50 (citing Fisher v. Wash. Metro. Area Transit Auth., 690 F.2d 1133, 1139-41 (4th Cir. 1982); Llaguno v. Mingey, 763 F.2d 1560, 1567-68 (7th Cir. 1985); McLaughlin v. County of Riverside, 888 F.2d 1276, 1278 (9th Cir. 1989)).

92. *Id.* (citing Williams v. Ward, 845 F.2d 374 (2d Cir. 1988)).

93. *See id.* at 56.

94. *Id.* at 47-48.

95. *Id.* at 47.

requirement did not count holidays and weekends.[96] Therefore, delays ranging from five to seven days were possible.[97] McLaughlin was incarcerated in the county jail when his complaint was filed, which alleged that he had not been provided with a determination of probable cause.[98] Consequently, McLaughlin requested declaratory and injunctive relief in the form of an order requiring the County to provide prompt bail, arraignment, and probable cause hearings to those arrested and detained without warrants.[99]

The United States District Court for the Central District of California certified the suit as a class action in November 1988, for every present and future arrestee in the county jail.[100] Then, the district court found that the County's arrest and detention procedures violated the Supreme Court's *Gerstein* decision.[101] Consequently, the County had to provide determinations of probable cause inside of thirty-six hours of an arrest, unless exigent circumstances existed.[102] After consolidating McLaughlin's class action with an identical proceeding involving San Bernardino County, the United States Court of Appeals for the Ninth Circuit upheld the district court's holding that the County's practice of providing probable cause findings within forty-eight hours of arrest violated *Gerstein*.[103] The Supreme Court then granted certiorari to clarify *Gerstein*'s "promptness" requirement regarding probable cause determinations.[104]

Initially, the Court rejected the County's argument that the plaintiffs lacked standing.[105] Then, the Court explained how *Gerstein* was an attempt to balance the competing interests that states have in providing public safety by detaining persons suspected of engaging in criminal activity, with private citizens' inter-

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96. *Id.*
97. *Id.*
98. *Id.* at 48.
99. *Id.*
100. *Id.* at 49.
101. *Id.*
102. *Id.*
103. *Id.* at 49, 50 (citing McLaughlin v. County of Riverside, 888 F.2d 1276, 1278 (9th Cir. 1989) (providing that a forty-eight hour requirement conflicted with *Gerstein*'s promptness stipulation because only thirty-six hours were necessary to carry out the administrative steps following an arrest), *vacated*, 500 U.S. 44).
104. *Id.* at 50.
105. *See id.* at 50-52. Regarding the named plaintiffs, the County argued that standing did not exist because too much time had passed for them to receive a prompt hearing and under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the plaintiffs could not show the likelihood of being subjected to unconstitutional conduct in the future. *McLaughlin*, 500 U.S. at 50-51. The Court rejected the County's *Lyons* argument and distinguished the case by noting that in *Lyons* the constitutional violation had ceased before the complaint was filed; but, in the principle case, the plaintiffs were in custody and had not received probable cause determinations when their complaint was filed. *See id.* at 51. Thus, injunctive relief was an appropriate remedy for the plaintiffs' injuries. *Id.* The Court also noted that even though the named plaintiffs' claims had been rendered moot, through their release or grant of probable cause determinations, the action was still reviewable due to the presence of unnamed class members. *Id.* at 51-52 (citing Gerstein v. Pugh, 420 U.S. 103, 110-11 n.11 (1975) (citing Sosna v. Iowa, 419 U.S. 393 (1975))); Schall v. Martin, 467 U.S. 253, 256 n.3 (1984)). Furthermore, the Court had jurisdiction although class certification occurred after the named plaintiffs' cases were moot because of the inherently transitory nature of the claims, *id.* at 52 (citing United States Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980) (citing *Gerstein*, 4200 U.S. at 110 n.11))), which allowed for the "relation back doctrine" to save the merits of the controversy for judicial review. *Id.* (citing Swisher v. Brady, 438 U.S. 204, 213-14 n.11 (1978); *Sosna*, 419 U.S. at 402 n.11).

ests in not being detained on unfounded reasons for prolonged periods of time.[106] Also, the Court described *Gerstein* as requiring prompt judicial determinations of probable cause, pursuant to the Fourth Amendment, but at the same time allowing individual states to provide these determinations in different manners so as to give deference to federalism.[107] Subsequently, the Court reasoned that *Gerstein*'s emphasis on flexibility and experimentation could not lead to a Fourth Amendment holding in which probable cause determinations had to be made immediately after the administrative steps following an arrest.[108] Instead, the practical realities of such matters as paperwork delays, bail determinations, and increased arrests on weekends, needed to be taken into account when prescribing a specific time limit beyond which a Fourth Amendment violation would occur.[109]

In order to provide the states with a bright-line timing requirement, while at the same time taking into account *Gerstein*'s countervailing interests of flexibility and the need to give warrantless arrestees timely findings of probable cause, the Court held that such findings within forty-eight hours of a warrantless arrest would generally satisfy *Gerstein*'s promptness requirement.[110] However, even if a probable cause determination was provided within forty-eight hours, a constitutional violation could occur if the determination was unreasonably delayed.[111] When this type of delay occurs the arrested individual must prove unreasonableness.[112] Conversely, when a determination of probable cause is not made within forty-eight hours of arrest the State has the burden of justifying the delay with an exigent or emergency circumstance.[113] In addition, intervening weekends and procedural hindrances would not be considered extraordinary circumstances.[114]

Before applying this ruling to the County's procedures for arrest and detention the majority criticized Justice Scalia's dissenting opinion, specifically the portion in which he argued twenty-four hours would be a more appropriate time limit than forty-eight hours.[115] The majority noted a shorter timing requirement would not be constitutionally compelled and would be an unfunded mandate, interfering with states' control over their local criminal justice systems.[116] Ultimately, the Court held that the County's policy for providing judicial determinations of probable cause was potentially unconstitutional because weekends and holidays were excluded from the computation of time between arrest and

106. *See id.* at 52-53 (citing *Gerstein*, 420 U.S. 103).

107. *See id.* at 53 (citing *Gerstein*, 420 U.S. 103).

108. *Id.* at 53-54. The Court explained how requiring judicial determinations of probable cause immediately after the administrative steps subsequent to arrest, a holding advanced by the Ninth Circuit and the dissenters in the principal case, was contrary to *Gerstein*'s emphasis on experimentation and flexibility. *Id.* at 54. Furthermore, the Court characterized Justice Scalia's use of the common law to support an immediate finding of probable cause in his dissenting opinion as reliance on a "vague admonition." *Id.* at 54-55.

109. *See id.* at 55.

110. *See id.* at 55-56.

111. *Id.* at 56 ("Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.").

112. *See id.*

113. *Id.* at 56-57.

114. *Id.* at 57.

115. *Id.*

116. *See id.* at 57-58.

probable cause determination, resulting in delays exceeding forty-eight hours.[117] Therefore, the Ninth Circuit's thirty-six hour holding was vacated and the case was remanded in order for the lower courts to determine if there were legitimate reasons for the County's delays.[118]

However, in dissent to the majority opinion, Justice Marshall, joined by Justices Stevens and Blackmun, argued that *Gerstein*'s promptness requirement could only be met if a probable cause determination was made immediately after the administrative steps following arrest.[119] Justice Scalia, writing separately, also dissented from the majority opinion and would have found a Fourth Amendment violation if, following a warrantless arrest, a probable cause determination was delayed for a purpose not related to the procedural requirements of law enforcement, or if twenty-four hours passed between arrest and probable cause determination.[120] Justice Scalia based his holding on the traditional common law protection in which persons arrested without warrants had to be delivered to magistrates as soon as reasonably possible.[121] Consequently, he rejected the majority's use of a balancing approach to resolve the Fourth Amendment issue since this common law principle existed in 1791 and had been carried forward to modern times.[122] Moreover, Justice Scalia's selection of twenty-four hours as being an adequate quantity of time for providing probable cause determinations and completing arrest procedures, was based on numerous opinions by courts, commentators, and commissions.[123]

Although the majority resolved the issue of what constituted a "prompt" determination of probable cause in *McLaughlin*,[124] other questions arising from unreasonable delays were left unresolved. For example, would a confession obtained after a delayed probable cause determination be admitted into evidence or be deemed inadmissible pursuant to the exclusionary rule? Also, should the *McLaughlin* holding be applied retroactively to every case not final at the time

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117. *Id.* at 58-59.

118. *See id.* at 59.

119. *Id.* (Marshall, J., dissenting).

120. *See id.* at 70 (Scalia, J., dissenting). Scalia would also employ the burden shifting method provided by the majority, with the arrestee having to prove unreasonableness before twenty-four hours passed, but the State having to prove the existence of an unforeseeable circumstance to justify delays occurring past twenty-four hours. *Id.* (Scalia, J., dissenting).

121. *See id.* at 60-61 (Scalia, J., dissenting) (citing 2 M. HALE, PLEAS OF THE CROWN 95 n.13 (1st Am. ed. 1847); 4 W. BLACKSTONE, COMMENTARIES 289, 293; Wright v. Court, 107 Eng. Rep. 1182 (K.B. 1825); 1 R. BURN, JUSTICE OF THE PEACE 267-77 (1837)).

122. *See id.* at 60 (Scalia, J., dissenting). Justice Scalia also did not accept the majority's findings that *Gerstein* required flexibility and experimentation in the timing of probable cause determinations. *See id.* at 65 (Scalia, J., dissenting). Instead, Scalia believed the Court in *Gerstein* was referring to the nature of the probable cause determination, whether it should be adversarial or allow for testimony, when calling for experimentation and flexibility. *See id.* (Scalia, J., dissenting).

123. *See id.* at 68-70 (Scalia, J., dissenting) (citations omitted). Furthermore, Justice Scalia did not believe that persons subjected to warrantless arrests should even have to wait for the administrative steps following arrest to be completed before receiving a probable cause determination if a magistrate was available to hold a hearing. *Id.* at 66 n.2 (Scalia, J., dissenting) (explaining that an individual should not be subjected to photographing or fingerprinting when a probable cause determination affecting the arrestee's freedom of movement could be made).

124. *Id.* at 56.

the ruling was announced? In *Powell v. Nevada*,[125] both of these issues were discussed by the Supreme Court, but only the latter was decided.[126]

C. Powell v. Nevada

Kitrich Powell ("Powell") was held in police custody for four days without a probable cause determination after being arrested for the felony abuse of a child.[127] On the fourth day in custody a Magistrate found probable cause to hold Powell, and on that same day Powell made incriminating statements to police that were used against him at trial.[128] By the time of Powell's preliminary hearing the child had died from her injuries and Powell was subsequently found guilty of first-degree murder and sentenced to death.[129] Before the Nevada Supreme Court Powell contended that his conviction should be reversed since the failure to bring him in front of a judge within seventy-two hours of arrest violated Nevada's initial appearance law.[130] Although the Nevada Supreme Court upheld Powell's conviction because he waived his right to a prompt appearance within seventy-two hours of arrest, the court went on to declare Nevada's seventy-two hour initial appearance statute unconstitutional since it exceeded *McLaughlin*'s forty-eight hour Fourth Amendment holding.[131] Further, the court held that this did not affect Powell's conviction since he was arrested before the *McLaughlin* holding, in which the Supreme Court declared a new rule that was not required to be applied retroactively.[132]

On writ of certiorari, the United States Supreme Court specifically addressed the Nevada Supreme Court's decision to not apply *McLaughlin* to Powell's case.[133] Relying on *Griffith v. Kentucky*,[134] the Court held that *McLaughlin*'s forty-eight hour rule was to be applied in all cases, federal or state, not yet finalized when the rule was declared.[135] Since Powell was held well in excess of forty-eight hours before receiving a judicial determination of probable cause and his case was not final at the time *McLaughlin* was decided, the Nevada Supreme Court's retroactivity decision was incorrect.[136] However, as to the consequences of *McLaughlin* applying to Powell's case, such as whether or not his conviction should be reversed, the Supreme Court left for the Nevada Supreme Court to determine on remand.[137]

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125. 511 U.S. 79 (1994).
126. *See id.* at 80, 84-85.
127. *Id.* at 81.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 82-83.
132. *Id.* at 83.
133. *Id.*
134. 479 U.S. 314, 328 (1987).
135. *See Powell*, 511 U.S. at 84-85.
136. *See id.*
137. *See id.*

Conversely, Justice Thomas, with Chief Justice Rehnquist joining in dissent, would have decided the remedy issue and held that Powell's incriminating statements could be used as evidence despite the delay in excess of forty-eight hours of Powell's probable cause determination.[138] First, Justice Thomas argued that certiorari should not have been granted since the Nevada Supreme Court's decision was obviously erroneous, given *Griffith*'s retroactivity rule which had caused little or no conflict among the circuit courts.[139] Then, the dissent addressed the appropriate remedy issue since remanding would have required the needless consumption of judicial time on a meritless claim.[140] While assuming, for the sake of argument, *McLaughlin* violations should lead to the suppression of evidence, Justice Thomas did not believe suppression was appropriate in Powell's case since his confession was not the fruit of an illegal seizure.[141] Only if a Magistrate had found Powell's arrest to be unsupported by probable cause within forty-eight hours of detention would Powell's statement be causally connected to the timing of his probable cause determination.[142]

On remand, the Nevada Supreme Court directly addressed the issue of whether a *Gerstein/McLaughlin* violation required the suppression of evidence.[143] The court noted that the exclusionary rule should only be applied to Fourth Amendment violations when the purposes for which the rule was created would be served by the exclusion.[144] Consequently, exclusion of all confessions obtained through unlawful detentions would not be constitutionally required.[145] Therefore, the admission of a confession obtained through an unlawful detention would be determined through voluntariness and related factors such as the existence of intervening circumstances.[146] The court went on to hold that although the district court failed to make any determination as to the voluntariness of Powell's statements, the admission of the statements at trial was harmless error and therefore, Powell's conviction was upheld.[147]

D. The Circuit Courts of Appeals Application of Gerstein/McLaughlin *with Emphasis on the Fifth Circuit*

Gerstein/McLaughlin violations usually come before courts in two different instances. One, in civil actions brought under 42 U.S.C. § 1983, when individu-

138. *See id.* at 85, 91-92 (Thomas, J., dissenting).

139. *See id.* at 86-87 (Thomas, J., dissenting).

140. *Id.* at 88 (Thomas, J., dissenting).

141. *See id.* at 89 (Thomas, J., dissenting).

142. *Id.* at 90 (Thomas, J., dissenting). Justice Thomas also analogized Powell's case to a previous Court decision in which a suspect's incriminating statement was deemed admissible even though the statement was obtained after a warrantless arrest, although the arrest was later found to be supported by probable cause. *Id.* at 91 n.1 (Thomas, J., dissenting) (citing New York v. Harris, 495 U.S. 14, 18 (1990)). Although the majority did not attempt to resolve the suppression issue, Justice Ginsburg did distinguish *Harris* from the facts of Powell's case in response to Justice Thomas's dissent. *Id.* at 85 n.*. Furthermore, the majority noted that "[a] court's postsearch validation of probable cause will not render . . . [illegally obtained] evidence admissible." *Id.* (citing Vale v. Louisiana, 399 U.S. 30, 35, 34 (1970)).

143. Powell v. State, 930 P.2d 1123, 1125 (Nev. 1997).

144. *See id.* at 1125 (citing Arizona v. Evans, 514 U.S. 1 (1995)).

145. *Id.* at 1126.

146. *Id.* (quoting Arterburn v. State, 901 P.2d 668, 671 (1995) (citing Oregon v. Elstad, 470 U.S. 298, 306 (1984)).

147. *See id.* (explaining that Powell's statements made during the unlawful detention were the same as those he made immediately after his arrest).

als seek monetary or injunctive relief against law enforcement individuals or agencies. Two, in criminal actions where a defendant is seeking the exclusion of evidence allegedly obtained through an unreasonable delay of a probable cause determination after a warrantless arrest. The United States Circuit Courts of Appeals have provided varying decisions regarding these two situations. Therefore, the courts' substantive decisions will be provided with emphasis on Fifth Circuit opinions. The Fifth Circuit's holdings will be focused upon since the court's territorial boundaries include Mississippi; and consequently, the Mississippi Supreme Court may be influenced by the circuit's decisions.

1. Circuit Court Opinions

Federal circuit courts have addressed *Gerstein/McLaughlin* violations in criminal and civil appeals with varying results. For example, in an appeal from a criminal conviction the First Circuit found a fifty-one hour delay of a judicial determination of probable cause to be justified by extraordinary circumstances.[148] Also, in *United States v. Forde*,[149] the First Circuit refused to exclude evidence obtained from an arrestee who had not received a judicial finding of probable cause within forty-eight hours of being detained.[150] Further, the Second Circuit has chosen not to apply *McLaughlin*'s forty-eight hour requirement to border detentions of suspected alimentary canal drug smugglers.[151] In addition, regarding a civil rights action brought under 42 U.S.C. § 1983, the Third Circuit found Pennsylvania's arrest and pretrial procedures, which required judicial determinations of probable cause within forty-eight hours of arrest, to be in accordance with the Fourth Amendment as applied in *Gerstein/McLaughlin*.[152] Moreover, in *United States v. Van Metre*,[153] the Fourth Circuit rejected a defendant's claim that his confession should have been suppressed pursuant to a *McLaughlin* violation.[154]

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148. *See* United States v. Ayala, 289 F.3d 16, 19-20 (1st Cir. 2002) (providing that the existence of more than 100 detainees arrested during a military exercise on an island near Puerto Rico justified a minor delay past forty-eight hours).

149. No. 93-1322, 30 F.3d 127, 1994 WL 390143 (1st Cir. June 30, 1994) (unpublished table decision).

150. *See id.* at *3 (noting that a Fourth Amendment violation did occur, but the evidence was obtained before any unlawful detention and therefore the violation could not retroactively void the prior legal search) (citing United States v. Crews, 445 U.S. 463, 471 (1980)); *accord* United States v. Fullerton, 187 F.3d 587, 591 (6th Cir. 1999) (rejecting suppression as an appropriate remedy for a *McLaughlin* violation when the evidence was obtained before the violation occurred).

151. *See* United States v. Esieke, 940 F.2d 29, 35 (2d Cir. 1991) (distinguishing border detentions from arrests which do require judicial approval) (citing United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985)); *cf.* Mitarontonda v. Gazzola, No. 98-7604, 172 F.3d 38, 1999 WL 39013, at *2 (2d Cir. Jan. 27, 1999) (unpublished table decision) (holding that a police officer was entitled to qualified immunity since detaining a suspect overnight before presentment to a judicial officer for a probable cause determination was in accordance with *McLaughlin*'s forty-eight hour requirement). *But see* United States v. Onyema, 766 F. Supp. 76, 82-83, 84 (E.D.N.Y. 1991) (district court within the Second Circuit suppressing evidence obtained through a seventy-eight hour delay, which the court found to violate the Fourth Amendment as interpreted by *Gerstein/McLaughlin*).

152. *See* Stewart v. Abraham, 275 F.3d 220, 223, 228-29 (3d Cir. 2001).

153. 150 F.3d 339 (4th Cir. 1998).

154. *See id.* at 347-48 (noting that the defendant's arraignment was delayed in excess of forty-eight hours; but, since the defendant was arrested through the use of a warrant *McLaughlin*'s Fourth Amendment holding was inapplicable).

However, in a 2003 opinion the Sixth Circuit found local law enforcement officers, as defendants in a § 1983 action, to not be entitled to qualified immunity when an arrestee's probable cause determination was delayed for approximately seventy-two hours.[155] The Seventh Circuit has provided conflicting opinions regarding whether delays within forty-eight hours of arrest, for the purpose of further investigation, constitute *McLaughlin* violations.[156] Also, a district court within the Seventh Circuit has deemed suppression of evidence as the appropriate remedy for such violations in criminal cases.[157] Comparatively, the Eight Circuit has found a delay as short as two hours to constitute a Fourth Amendment violation because the delay was for the purpose of investigating other crimes.[158] On the specific issue of whether suppression of evidence is an appropriate remedy for a *McLaughlin* violation the Ninth Circuit has held that evidence should be excluded if it comes from the fruit of a poisonous tree.[159] In the context of civil actions, the Tenth and Eleventh Circuits have both refused to find law enforcement officials liable for *McLaughlin* violations when plaintiffs

155. *See* Cherrington v. Skeeter, 344 F.3d 631, 642-44 (6th Cir. 2003) (refusing to deem the existence of an ongoing undercover investigation or the fact that the arrest occurred over a holiday weekend, as extraordinary circumstances that would justify the seventy-two hour delay); *cf.* Alkire v. Irving, 330 F.3d 802, 814 (6th Cir. 2003) (providing that a material factual dispute existed regarding whether a § 1983 plaintiff was arrested pursuant to a warrant, but if a warrantless arrest occurred a Fourth Amendment violation existed since the individual's probable cause determination was delayed in excess of forty-eight hours).

156. *Compare* United States v. Sholola, 124 F.3d 803, 810, 819-20 (7th Cir. 1997) (finding no *McLaughlin* violation when a suspect's judicial probable cause determination was held within forty hours of arrest, but delayed for the purpose of investigating other, separate crimes not related to the initial arrest), *and* United States v. Daniels, 64 F.3d 311, 314 (7th Cir. 1995) (holding that a forty-hour delay of a probable cause finding for the purpose of investigating the crime the suspect was arrested for did not fall into *McLaughlin*'s prohibition against delays for the purpose of gathering evidence to justify an arrest), *with* Willis v. City of Chicago, 999 F.2d 284, 288-89 (7th Cir. 1993) (ruling that a *Gerstein/McLaughlin* violation occurred when an arrestee was detained for forty-five hours before receiving a probable cause hearing, which the City claimed was delayed for the purpose of investigating crimes unrelated to the individual's arrest). Also, in *Willis* the court noted *McLaughlin* would clearly be violated if a suspect's probable cause hearing was delayed "for the purpose of gathering evidence to justify the arrest." *Willis*, 999 F.2d at 288 (citing County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991)).

157. *See* United States v. Leal, 876 F. Supp. 190, 191, 194-95 (C.D. Ill. 1995) (holding that suppression of a detainee's statement was the appropriate remedy for a *McLaughlin* violation, when the statement was obtained during a seventy-two hour delay between arrest and probable cause determination); *see also* Kyle v. Patterson, 196 F.3d 695, 696-97 (7th Cir. 1999) (explaining how the suppression of statements obtained during delays in providing probable cause determinations was the usual remedy for *Gerstein/McLaughlin* violations in criminal cases). The court's statement on suppression in *Kyle* could easily be characterized as dictum since the case was a civil action brought under 42 U.S.C. § 1983 and the plaintiff was seeking damages, and not the suppression of evidence. *See Kyle*, 196 F.3d at 697.

158. *See* United States v. Davis, 174 F.3d 941, 943-44, 948 (8th Cir. 1999) (relying on the principle that delays motivated by the intent to uncover evidence to support an arrest or to investigate other crimes are unreasonable) (citing *McLaughlin*, 500 U.S. at 56; *Willis*, 999 F.2d at 288-89). As a result of the Fourth Amendment violation the Eighth Circuit upheld the lower court's decision to suppress statements made by the accused, while at the same time choosing not to deem suppression as the presumptive remedy for a *Gerstein/McLaughlin* violation since the government had not argued the issue before the district court. *See id.* at 946 n.8, 948.

159. *See* Anderson v. Calderon, 232 F.3d 1053, 1070, 1071-72, (9th Cir. 2000) (applying the poisonous tree test as prescribed by *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), and *Wong Sun v. United States*, 371 U.S. 471, 488 (1963), but finding the arrestee's statements to be untainted by the *McLaughlin* violation and made of free will); *cf.* Hallstrom v. City of Garden City, 991 F.2d 1473, 1480-82 (9th Cir. 1993) (finding local law enforcement officials liable in a § 1983 action brought by a plaintiff whose probable cause hearing was delayed in excess of forty-eight hours in violation of *Gerstein/McLaughlin*).

could not show how arresting officers were individually responsible for judicial determinations of probable cause being delayed in excess of forty-eight hours.[160]

2. Fifth Circuit Decisions

White v. Taylor,[161] is the earliest Fifth Circuit decision involving a *McLaughlin* claim, and as of the time this Note was written, the only case appealed from a United States District Court within Mississippi involving an alleged *McLaughlin* violation. The issue before the Fifth Circuit was whether qualified immunity should have been granted to a police chief who was purported to have violated James White's ("White") rights under 42 U.S.C. § 1983.[162] White initially brought the action in the United States District Court for the Southern District of Mississippi, against the City of Morton, a Morton police officer, and Morton's police chief, after he was arrested and held overnight in the Morton jail without a probable cause determination from a neutral magistrate.[163] White alleged that the detention violated his rights guaranteed by the Fourth Amendment and a jury verdict was returned in his favor in the amount of $1.00 in nominal damages and $25,000 in punitive damages against the police chief.[164]

On appeal the Fifth Circuit reversed the jury verdict and held that the police chief should have been granted qualified immunity since the right White was claiming to be violated was not clearly established at the time of his arrest and detention.[165] At the time of his arrest in 1987, White's Fourth Amendment claim was governed by *Gerstein*'s promptness requirement and not *McLaughlin*'s forty-eight hour burden shifting rule.[166] Noting how the Supreme Court in *McLaughlin* described the *Gerstein* promptness requirement as "vague,"[167] the Fifth Circuit ruled a reasonable officer would not have known holding White overnight without a probable cause determination violated the Fourth Amendment.[168] In dissent, Chief Judge Politz argued that the jury's verdict should not be overturned since there was an intentional violation of Mississippi

160. *See* Strepka v. Miller, 28 Fed. Appx. 823, 828 (10th Cir. 2001); Lindsey v. Storey, 936 F.2d 554, 563 (11th Cir. 1991); *cf.* Rodriguez v. Farrell, 294 F.3d 1276, 1277 (11th Cir. 2002) (holding that an eighteen hour delay between an individual being arrested and being released (by being dropped off near his residence), was not an unreasonable seizure and was in compliance with *McLaughlin*'s forty-eight hour requirement). Even if the plaintiff's release was delayed beyond forty-eight hours in *Rodriguez* a *McLaughlin* Fourth Amendment violation would not have occurred since Rodriguez was arrested pursuant to a warrant. *See Rodriguez*, 294 F.3d at 1277; *cf.* United States v. Van Metre, 150 F.3d 339, 347-48 (4th Cir. 1998) (noting that the defendant's arraignment was delayed in excess of forty-eight hours; but, since the defendant was arrested through the use of a warrant *McLaughlin*'s Fourth Amendment holding was inapplicable); Lawrence v. State, 869 So. 2d 353, 356 (Miss. 2003) (finding no Fourth Amendment violation under *Gerstein/McLaughlin* since an arrest warrant was served the day after an arrest, representing a judicial finding of probable cause).

161. 959 F.2d 539 (5th Cir. 1992).

162. *Id.* at 540.

163. *Id.* at 540-41.

164. *Id.*

165. *Id.* at 546.

166. *See id.*

167. *See id.* (citing County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991)).

168. *See id.*

law designed to safeguard constitutional rights.[169] Also, in rejecting the majority's holding Chief Judge Politz explained *Gerstein* should not be used to authorize the arrest and subsequent detention of "individuals who merely 'mouth off.'"[170]

The Fifth Circuit has also reviewed alleged *McLaughlin* violations in the context of criminal appeals from persons convicted of smuggling drugs across the United States/Mexican border.[171] In *Perez-Bustamante*, the issue before the court was whether an individual's confession should be suppressed since that person was detained for sixty hours before making a confession, and further held in custody for two more days before being taken in front of a magistrate.[172] Rafeal Perez-Bustamante ("Perez") claimed 18 U.S.C. § 3501(c) rendered his confession inadmissible since his admission was obtained in excess of six hours following arrest, and the delay in bringing him before a magistrate was not caused by transportation delays.[173] Also, Perez argued that his five-day detention without a probable cause determination violated the Fourth Amendment as interpreted by *McLaughlin*.[174] In rejecting these claims the Fifth Circuit noted that the purpose of *McLaughlin*, in further clarifying *Gerstein*, was to ensure that states provided prompt probable cause determinations.[175] Conversely, "[o]n the federal stage, Rule 5(a) addresses this concern."[176] The court went on to apply § 3501's totality of the circumstances test without employing *McLaughlin* and found Perez's confession to be voluntarily given and therefore admissible.[177] However, the court did note that five-day delays in bringing defendants before magistrates were generally impermissible.[178]

In *Adekunle*, the issue before the Fifth Circuit was whether a suspected alimentary canal drug smuggler's 100-hour detention, in advance of being taken to a magistrate, was unconstitutional.[179] Customs officials detained Kamorudeen Adekunle ("Adekunle") and a companion at the United States/Mexican border on the suspicion that the two were smuggling drugs.[180] During their detention the men were strip-searched and read their Miranda warnings, but not arrested.[181] The initial detention occurred on a Saturday, after which Adekunle was taken to a local hospital and held for two days before officials obtained a court order from a magistrate requiring Adekunle to submit to an x-ray examination which

169. *See id.* at 549-50 (Politz, C.J., dissenting).

170. *See id.* at 550 (Politz, C.J., dissenting).

171. *See* United States v. Perez-Bustamante, 963 F.2d 48 (5th Cir. 1992); United States v. Adekunle, 980 F.2d 985 (5th Cir. 1992), *vacated in part*, 2 F.3d 559 (5th Cir. 1993).

172. *Perez-Bustamante*, 963 F.2d at 49.

173. *See id.* at 52.

174. *See id.* at 53.

175. *Id.*

176. *Id.* Was the court suggesting *McLaughlin*'s Fourth Amendment holding does not apply when the federal government causes a judicial determination of probable cause to be unreasonably delayed?

177. *See id.* at 53-54.

178. *Id.* at 54.

179. *See* United States v. Adekunle, 980 F.2d 985, 986 (5th Cir. 1992), *vacated in part*, 2 F.3d 559 (5th Cir. 1993).

180. *Id.* at 986-87.

181. *Id.*

would reveal the presence of any foreign objects in his abdomen.[182] The exam revealed the existence of foreign objects and that evening, when Adekunle began passing heroin filled balloons, he was formally arrested but held in the hospital for two more days until all the balloons had been expelled.[183] Adekunle was then jailed and taken before a magistrate the following morning after a total of 100 hours had passed since his initial detention at the border.[184]

After entering a conditional plea of guilt to drug smuggling Adekunle argued before the Fifth Circuit that the delay in bringing him before a magistrate was impermissible, and therefore any statements made during this period of time were inadmissible.[185] The court recognized that unnecessary delay in providing a probable cause determination after a warrantless arrest could lead to a Fourth Amendment violation.[186] However, Adekunle's ability to control his bodily functions, along with the need to monitor him until the heroin was safely expelled, led the Fifth Circuit to find the delay justified.[187]

On rehearing before the same panel of the Fifth Circuit, the court reached the same conclusion, but with a different justification.[188] This time the court reasoned that *McLaughlin*'s forty-eight hour requirement should not only apply to probable cause determinations, but also reasonable suspicion evaluations.[189] Whether a suspect is detained on probable cause or reasonable suspicion, the same liberty interests are at stake.[190] However, Adekunle's 100-hour detention was constitutional because a magistrate issued an x-ray order within forty-eight hours of his initial confinement at the United States border.[191] This order was an implicit judicial evaluation of reasonable suspicion that satisfied Adekunle's constitutional rights and therefore, Adekunle's drug smuggling conviction was affirmed.[192]

In *West v. Johnson*,[193] the Fifth Circuit was again faced with the issue of whether a suspect's statement should be suppressed on the allegation that the individual's presentment before a magistrate was unreasonably delayed.[194] Robert West, Jr. ("West") was arrested without a warrant on the suspicion of murder in the early morning hours of August 24, 1982.[195] After West was convicted and sentenced to death for capital murder he sought habeas corpus relief

182. *See id.*
183. *Id.* at 987.
184. *Id.*
185. *See id.* at 986, 989.
186. *See id.* at 989 (citing Gerstein v. Pugh, 420 U.S. 103 (1975); County of Riverside v. McLaughlin, 500 U.S. 44 (1991)).
187. *Id.*
188. *See* United States v. Adekunle, 2 F.3d 559, 562 (5th Cir. 1993) (finding Adekunle's detention to pass "constitutional muster").
189. *See id.* at 561-62.
190. *See id.* at 561 ("'confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships.'") (quoting *Gerstein*, 420 U.S. at 114).
191. *Id.* at 562.
192. *Id.*
193. 92 F.3d 1385 (5th Cir. 1996).
194. *See id.* at 1400, 1404.
195. *See id.* at 1390, 1401; West v. State, 720 S.W.2d 511, 513 (Tex. Crim. App. 1986) (providing that the arrest was warrantless).

in United States District Court.[196] Appealing the district court's denial of habeas corpus relief before the Fifth Circuit, West argued his confession obtained thirty hours after arrest should have been excluded since his presentment before a magistrate was unnecessarily delayed.[197] In response to this argument the Fifth Circuit found West's confession admissible since it was obtained within *McLaughlin*'s forty-eight requirement.[198] The court also noted that even if there was an unreasonable delay, the Constitution would not be implicated.[199] An unreasonable delay only prohibits the use of confessions in federal prosecutions,[200] and is only a factor to be considered in determining the voluntariness of a confession.[201] Since West's confession was voluntarily given his request for habeas relief was denied.[202]

At the time this Note was written, the most recent Fifth Circuit opinion deciding an alleged *McLaughlin* violation arose from a twenty-one hour detention.[203] Jason Mullin ("Mullin") was apprehended by military police at Fort Hood, Texas after he was observed trying to break into a vehicle.[204] After being detained twenty-one hours Mullin gave a full confession to the observed break-in and several other car burglaries that had recently occurred on the base.[205] On appeal, Mullin claimed the twenty-one hour detention rendered his confession involuntary.[206] The Fifth Circuit held that the detention was presumptively reasonable, since it lasted less than forty-eight hours.[207] Also, any delay was caused by Mullin's lies to authorities concerning his true identity and not by military police attempting to obtain a confession.[208] Consequently, Mullin's confession was voluntary and his conviction was upheld.[209]

E. Mississippi Supreme Court Precedent Applying Gerstein/McLaughlin

An interesting aspect of the Mississippi Supreme Court cases involving *Gerstein/McLaughlin* claims is that none of the above provided decisions by the circuit courts are discussed. Instead, most of these decisions are resolved by

196. *See West*, 92 F.3d at 1389.
197. *See id.* at 1389, 1404.
198. *See id.* at 1404, 1405.
199. *Id.* at 1404 (citing De La Rosa v. Texas, 743 F.2d 299, 303 (5th Cir. 1984)). How can this statement be correct when both *Gerstein* and *McLaughlin* announced Fourth Amendment violations of the United States Constitution arising from delays in judicial determinations of probable cause? True, in circumstances where an individual is arrested pursuant to a warrant and then not brought before a magistrate promptly *Gerstein/McLaughlin* would not apply since the warrant represents a judicial determination of probable cause. However, in the case of West who was not arrested pursuant to a warrant, see *West*, 720 S.W.2d at 513, *McLaughlin*'s forty-eight hour Fourth Amendment holding would be applicable.
200. *See West*, 92 F.3d at 1404 (citing Smith v. Heard, 315 F.2d 692, 694 (5th Cir. 1963) (citing Brown v. Allen, 344 U.S. 443 (1953)); Gallegos v. Nebraska, 342 U.S. 55 (1951)).
201. *See id.* (citing *Smith*, 315 F.2d at 694) (citing Culombe v. Connecticut, 367 U.S. 568 (1961)).
202. *See id.* at 1405, 1411-12.
203. *See* United States v. Mullin, 178 F.3d 334, 342 (5th Cir. 1999).
204. *Id.* at 336.
205. *See id.* at 336, 337.
206. *Id.* at 342.
207. *See id.* (citing County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991)).
208. *See id.*
209. *See id.* at 342-43.

either directly applying *McLaughlin*'s burden-shifting forty-eight hour requirement, or by using Mississippi Supreme Court precedent involving alleged violations of Mississippi's Initial Appearance Rule 6.03.[210] In fact, the *McLaughlin* question in *Swinney* was addressed by the court only looking at two prior decisions involving Rule 6.03, and the *McLaughlin* opinion.[211] This subsection will provide Mississippi Supreme Court cases applying *McLaughlin* and the two decisions involving Rule 6.03, that the *Swinney* court found relevant in resolving the unreasonable delay issue on appeal.

1. Pre-Swinney Opinions Referencing or Applying McLaughlin

The *McLaughlin* decision was first mentioned by the Mississippi Supreme Court in two 1991 opinions.[212] However, neither case provided a substantive resolution of a *McLaughlin* Fourth Amendment challenge. In *Veal*, Dwayne Veal ("Veal") could not make a *McLaughlin* claim because he was detained pursuant to an arrest warrant.[213] Nonetheless, Veal argued that the delay in providing him an initial appearance violated Rule 1.04,[214] and thus made his confession inadmissible.[215] Regarding this claim the supreme court noted that Mississippi law recognized law enforcement's need to have the ability to conduct investigations prior to a suspect's initial appearance, and the impracticability of immediate initial appearances.[216] To support this proposition the court cited *McLaughlin* by analogy, but did not provide an explanatory parenthetical.[217] Ultimately, the court held that even if the unnecessary delay requirement of Rule 1.04 was violated, Veal's voluntary and knowing waiver allowed the admission of his confession into evidence.[218]

In *Hansen*, the court's reference to *McLaughlin* arose from Tracy Hansen's ("Hansen") claim that he was prejudiced when a trial court refused to grant him a preliminary hearing.[219] Before finding the circuit court's denial of Hansen's motion for a preliminary hearing to be harmless error, the court noted that Rule 1.04 required an initial appearance without unreasonable delay and *McLaughlin* required an initial appearance within forty-eight hours.[220] The exact time between Hansen's arrest and initial appearance was not provided in the opinion.

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210. MISS. R. UNIF. CIR. CTY. CT. 6.03.

211. *See* Swinney v. State, 829 So. 2d 1225, 1231-32 (Miss. 2002).

212. Hansen v. State, 592 So. 2d 114 (Miss. 1991); Veal v. State, 585 So. 2d 693 (Miss. 1991).

213. *See Veal*, 585 So. 2d at 694. *Cf.* United States v. Van Metre, 150 F.3d 339, 347-48 (4th Cir. 1998) (noting that the defendant's arraignment was delayed in excess of forty-eight hours; but, since the defendant was arrested through the use of a warrant *McLaughlin*'s Fourth Amendment holding was inapplicable); Lawrence v. State, 869 So. 2d 353, 356 (Miss. 2003) (finding no Fourth Amendment violation under *Gerstein/McLaughlin* since an arrest warrant was served the day after an arrest, representing a judicial finding of probable cause).

214. MISS. UNIF. CRIM. R. CIR. CT. PRAC. 1.04 (replaced by Rule 6.03 on May 1, 1995).

215. *Veal*, 585 So. 2d at 698.

216. *Id.*

217. *Id.*

218. *See id.* at 699.

219. Hansen v. State, 592 So. 2d 114, 122 (Miss. 1991).

220. *Id.* at 122 n.1, 123.

None of Hansen's claims on appeal alleged a specific *McLaughlin* Fourth Amendment violation. The court affirmed Hansen's conviction and death sentence for capital murder.[221]

In *Ormond v. State*,[222] the issue that gave rise to a *McLaughlin* reference was whether the results from a gonorrhea exam, obtained by search warrant, should have been suppressed as the product of an unlawful search.[223] J.C. Ormond ("Ormond") was arrested on March 18, 1988, on the suspicion that he had raped an eight-year-old child.[224] The following day, while Ormond remained in custody, a search warrant was executed which required him to submit to a gonorrhea exam.[225] On March 21, Ormond was afforded his initial appearance.[226] After being convicted and sentenced to life without the possibility of parole, Ormond argued before the supreme court that the delay between the time of his arrest and initial appearance was unreasonable and therefore, the results of the exam obtained before the initial appearance were inadmissible.[227]

In analyzing this claim the court noted that Rule 1.04 required an individual to be provided an initial appearance without unnecessary delay, and unnecessary delay was defined as exceeding forty-eight hours.[228] However, the court's previous opinion in *Veal* lead to the ruling that evidence obtained prior to a delayed initial appearance, and used at trial, would not automatically result in a reversal of a conviction.[229] Moreover, the court found the following facts relevant: Ormond was read *Miranda* warnings, he did provide a valid waiver, and the evidence obtained before the initial appearance was objective, unlike a confession which could be obtained through interrogation.[230] An application of these facts to the salient law led the supreme court to hold that the trial court did not err when the results of the gonorrhea exam were allowed in as evidence.[231]

The first Mississippi Supreme Court opinion in which *McLaughlin*'s forty-eight requirement was actually applied was decided on December 8, 1994, in *Thorson v. State*.[232] Approximately forty-seven hours passed from the time Roger Thorson ("Thorson") was placed under police custody on Saturday,

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221. *Id.* at 122, 154.

222. 599 So. 2d 951 (Miss. 1992).

223. *See id.* at 955.

224. *See id.* at 954-55.

225. *See id.* at 955. The eight-year-old victim had tested positive for gonorrhea prior to Ormond's arrest. *See id.* at 954.

226. *Id.* at 955.

227. *Id.* at 954, 955.

228. *Id.* at 955 (citing Hansen v. State, 592 So. 2d 114, 122 n.1 (Miss. 1991) (citing County of Riverside v. McLaughlin, 500 U.S. 44 (1991))).

229. *See id.* (citing Veal v. State, 585 So. 2d 693, 698-99 (Miss. 1991)).

230. *See id.* at 955-56.

231. *Id.* at 958. If *Ormond* was strictly decided by applying *McLaughlin*'s forty-eight hour requirement the outcome would be uncertain since the facts presented did not indicate whether Ormond was arrested pursuant to an arrest warrant, search warrant, or solely based upon a probable cause determination by law enforcement. However, the search warrant requiring Ormond to submit to a gonorrhea exam was executed the day after his arrest and in order to administer this exam it is likely that the warrant required Ormond to be in some form of custody or detention. *See id.* at 955. Therefore, the warrant would represent a judicial determination of probable cause to detain Ormond within forty-eight hours of arrest and *McLaughlin* would likely be satisfied.

232. 653 So. 2d 876 (Miss. 1994).

March 7, until his initial appearance on Monday, March 9.[233] However, during an interrogation on the morning of March 9, approximately forty-one hours after being placed in custody, Thorson confessed to raping and murdering Gloria McKinney.[234] On appeal, Thorson argued that his confession should have been suppressed at trial, since the delay between his arrest and initial appearance violated Rule 1.04 and his Fourth Amendment rights under *Gerstein*.[235]

In response, the court noted that this Fourth Amendment right was addressed by *McLaughlin* which regarded probable cause determinations made inside of forty-eight hours as normally sufficient.[236] Then, the court cited the portion of *McLaughlin* which stipulated that Fourth Amendment violations could occur even if a probable cause determination was made within forty-eight hours if there existed "'delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.'"[237] Thorson's initial appearance was delayed because of a court administrator's scheduling error and not by law enforcement for the purpose of gathering enough evidence to support Thorson's arrest.[238] Therefore, Thorson's confession was found to be admissible because it "was not a product of any delay in taking him before a magistrate."[239] However, Thorson's case was remanded on an unrelated *Batson* hearing.[240]

2. Post-Swinney Opinions Referencing or Applying McLaughlin

Subsequent to *Swinney* being decided there have been three additional Mississippi Supreme Court opinions either applying or referencing *McLaughlin*. In *Jones v. State*,[241] the first decision post-*Swinney*, the issue giving rise to a *McLaughlin* reference was whether a suspect's confession should have been suppressed due to a failure in providing a timely initial appearance.[242] Jason Jones ("Jones") was arrested without a warrant in Memphis on January 10, returned to Mississippi on January 12, and given an initial appearance on January 15.[243] On January 12, after being returned to Mississippi, Jones confessed to murder.[244] On appeal Jones claimed the failure to provide him with an initial appearance within forty-eight hours of his January 12 arrest violated Mississippi's Initial Appearance Rule 6.03, and thus rendered his confession inadmissible.[245]

Two factors led the court to deny Jones's claim and deem his confession admissible. First, a delay in providing a timely initial appearance, in and of

233. *See id.* at 881, 883.
234. *See id.* at 881.
235. *Id.* at 886.
236. *Id.* (citing County of Riverside v. McLaughlin, 500 U.S 44 (1991)).
237. *Id.* (quoting *McLaughlin*, 500 U.S. at 56-57).
238. *See id.* at 886.
239. *Id.* at 887 (citing Veal v. State, 585 So. 2d 693, 699 (Miss. 1991)).
240. *Id.* at 896.
241. 841 So. 2d 115 (Miss. 2003).
242. *See id.* at 131-34.
243. *Id.* at 131-32.
244. *Id.* at 132.
245. *See id.* at 131-32.

itself, was not a sufficient reason to exclude a confession.[246] Second, the forty-eight hour requirement should have begun when Jones was returned to Mississippi, and not on his initial arrest by Memphis police.[247] Consequently, his confession was obtained well within forty-eight hours of being returned to Mississippi and before any unnecessary delay.[248] Therefore, Jones did not suffer any prejudice by his initial appearance being delayed.[249] *McLaughlin* was cited for the proposition that delays in transporting prisoners were reasonable per the Fourth Amendment.[250]

In *Lawrence v. State*,[251] the issue before the Mississippi Supreme Court was whether Rule 6.03 or the Fourth Amendment of the United States Constitution were violated when six days passed between the time Larry Lawrence ("Lawrence") was arrested without a warrant, and given an initial appearance.[252] The Mississippi Court of Appeals had held that the six-day delay between arrest and appearance before a judicial officer was an unreasonable seizure and therefore, a violation of the Fourth Amendment.[253] However, the supreme court decided the delay did not give rise to a Fourth Amendment violation because an arrest warrant was executed one day after Lawrence's initial detention.[254] Moreover, just because Rule 6.03 may have been violated did not automatically result in a Fourth Amendment violation.[255] Subsequently, Lawrence's conviction was affirmed.[256]

At the time this Note was written, the most recent Mississippi Supreme Court opinion referencing *McLaughlin* arose from a defendant's ineffective assistance of counsel claim.[257] Robert Simon ("Simon") alleged that his counsel at trial provided ineffective assistance because of the lack of an objection to the admission of a confession obtained between the time Simon was arrested and brought

246. *Id.* at 132 (citing Davis v. State, 743 So. 2d 326, 337 (Miss. 1999)).

247. *Id.* at 133.

248. *See id.* at 133-34.

249. *See id.* at 134.

250. *Id.* at 133. However, the Supreme Court decision would not have been applicable to Jones's claim since an arrest warrant was provided the night of his initial detention in order for Memphis police to hold him until sheriff's officers from Washington County could arrive and take him back to Mississippi. *See id.* at 122; *cf.* United States v. Van Metre, 150 F.3d 339, 347-48 (4th Cir. 1998) (noting that the defendant's arraignment was delayed in excess of forty-eight hours; but, since the defendant was arrested through the use of a warrant, *McLaughlin*'s Fourth Amendment holding was inapplicable); Lawrence v. State, 869 So. 2d 353, 356 (Miss. 2003) (finding no Fourth Amendment violation under *Gerstein/McLaughlin* since an arrest warrant was served the day after an arrest, representing a judicial finding of probable cause).

251. 869 So. 2d 353 (Miss. 2003).

252. *See id.* at 353.

253. *Id.* at 354.

254. *Id.* at 356.

255. *See id.* at 356. Rule 6.03 requires individuals arrested without warrants to have initial appearances within forty-eight hours where judicial determinations of probable cause will be made. *Id.* at 354-55 (citing MISS. R. UNIF. CIR. CTY. CT. 6.03). However, the United States Supreme Court has provided that the Constitution does not require adversarial or specific pretrial procedures for a judicial determination of probable cause. *See id.* at 356 (citing Gerstein v. Pugh, 420 U.S. 103, 124-25 (1975)). Consequently, a violation of Rule 6.03 "does not necessarily rise to the level of a constitutional violation." *Id.*

256. *Id.*

257. *See* Simon v. State, 857 So. 2d 668, 688 (Miss. 2003).

before a judicial officer.[258] First, the court noted that under *McLaughlin*, Simon had the burden of proving a violation since he was detained for less than forty-eight hours.[259] Second, since the delay did not exceed forty-six hours and could be attributed to bad weather and scheduling conflicts with other defendants, Simon could not prove that his rights were violated.[260] Consequently, Simon's counsel did not provide ineffective assistance by failing to object to the delay between Simon's detention and initial appearance.[261]

3. Opinions Applying Mississippi's Initial Appearance Rule Cited in Swinney

The two opinions besides *McLaughlin* the *Swinney* court looked to as being being salient also included claims in which delayed initial appearances were alleged to make confessions inadmissible.[262] However, neither decision referenced or applied *McLaughlin*, perhaps because both defendants were initially detained by arrest warrants, reflecting judicial determinations of probable cause.[263] In *Abram*, Donald Abram ("Abram") was held for approximately four days before being given an initial appearance.[264] During this period Abram was consistently interrogated and an initial appearance was only provided immediately after a confession was obtained, although a judge was at all times available during Abram's four-day detention.[265] Looking to Rule 1.04, the court explained all arrested individuals had to be taken in front of a judge without unnecessary delay.[266] Furthermore, "without unnecessary delay" had been defined as meaning "as soon as 'custody, booking, administrative and security needs have been met.'"[267] Otherwise, the absence of access to a judicial officer was the only allowable excuse for delay.[268]

Analyzing Abram's arrest and detention the court found his initial appearance to be delayed for the purpose of obtaining a confession.[269] Since this purpose was not a valid excuse for delay under Rule 1.04 the court found the delayed initial appearance to be reversible error because it produced an uncounseled confession, which was the entire basis for Abram's conviction.[270] Furthermore, the unnecessary delay violated Abram's right to counsel and therefore his capital murder conviction was reversed and death sentence vacated.[271]

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258. *See id.*
259. *See id.*
260. *See id.*
261. *Id.*
262. *See* Evans v. State, 725 So. 2d 613, 643 (Miss. 1998); Abram v. State, 606 So. 2d 1015, 1029 (Miss. 1992).
263. *See Evans*, 725 So. 2d at 643 (explaining how a warrant was issued for Evans's arrest on kidnapping charges); *Abram*, 606 So. 2d at 1019 (noting that an arrest warrant was obtained against Abram for capital murder and armed robbery).
264. See Abram, 606 So. 2d at 1029.
265. *See id.* at 1021-23, 1029.
266. *See id.* at 1029 (citing MISS. UNIF. CRIM. R. CIR. CT. PRAC. 1.04 (replaced by Rule 6.03 on May 1, 1995)).
267. *Id.* (quoting Nicholson v. State, 523 So. 2d 68, 76 (Miss. 1988)).
268. *Id.* (citing *Nicholson*, 523 So. 2d at 76).
269. *Id.*
270. *See id.*
271. *See id.* at 1029, 1043.

On the other hand, the Mississippi Supreme Court found an unnecessary delay claim to be without merit in *Evans*.[272] The court distinguished *Evans* from its prior holding in *Abram* by explaining that unlike Abram, Donald Evans ("Evans") was advised by counsel before making any incriminating statements to law enforcement.[273] Also, Evans's conviction was not entirely based on his confession.[274] Furthermore, Evans was repeatedly provided with *Miranda* warnings and had been detained for four days before making any statements.[275] Repeated *Miranda* warnings and the significant passage of time were two factors a previous opinion had described as being able to remove the taint from any unnecessary delay.[276] Consequently, the trial court ruling finding Evans's confessions to be admissible was affirmed.[277]

In summary, individuals claiming *McLaughlin* violations in Mississippi courts have not had a history of success. However, *Swinney* represented an opportunity for the Mississippi Supreme Court to reverse this trend. Although the delay in *Swinney* occurred within forty-eight hours of arrest, where Swinney had the burden of proving unreasonableness, the stated purpose for the delay could easily be considered impermissible under *McLaughlin*'s Fourth Amendment holding.

IV. INSTANT CASE *(Swinney II)*

In Swinney's second hearing before the Mississippi Supreme Court the identical four issues previously decided in the withdrawn opinion were again addressed: 1) whether Swinney's initial appearance was unreasonably delayed; 2) whether the trial court erred in admitting certain incriminating sections of Swinney's statements to law enforcement while excluding exculpatory portions; 3) whether the trial court erred by not granting a directed verdict to the robbery charge; and 4) whether the trial court's refusal to provide a circumstantial evidence instruction was erroneous.[278] The second, third, and fourth issues were analyzed through the same reasoning in the withdrawn opinion and essentially the same conclusions were reached.[279]

For instance, the supreme court held that the lower court erred in admitting incriminating portions of Swinney's statement to police while at the same time excluding exculpatory sections.[280] However, Swinney's failure to show that the error affected her trial's outcome resulted in the court deeming the error harmless.[281] Also, Swinney's directed verdict argument was rejected on rehearing

272. Evans v. State, 725 So. 2d 613, 644-45 (Miss. 1998).
273. *See id.* at 644.
274. *Id.*
275. *Id.*
276. *See id.* (citing Neal v. State, 451 So. 2d 743, 757 (Miss. 1984)).
277. *See id.* at 645.
278. *Compare* Swinney v. State, 829 So. 2d 1225, 1230, 1235-36 (Miss. 2002), *with* Swinney v. State, No. 1999-KA-00031-SCT, 2001 Miss. LEXIS 45, at **7-8, 19-20, 22, 24 (Miss. March 1, 2001).
279. *Compare Swinney*, 829 So. 2d at 1235-37, *with Swinney*, 2001 Miss. LEXIS 45, at **19-25.
280. *Swinney*, 829 So. 2d at 1236.
281. *Id.*

since there was sufficient evidence for the jury to find Swinney guilty of robbery.[282] In addition, the court found no error in the trial judge's decision to not give the jury a circumstantial evidence instruction since direct evidence of the robbery existed in the form of Swinney's confession.[283]

Conversely, the court reached a different conclusion on the unreasonable delay issue, giving rise to a *McLaughlin* analysis.[284] Again, Swinney alleged that the delay between her arrest and initial appearance was unnecessary and in violation of Rule 6.03, which required initial appearances inside of "forty-eight hours and without unnecessary delay."[285] Although Swinney's initial appearance was held within forty-three hours of arrest on November 19, she alleged the delay was nonetheless unnecessary because law enforcement was ready, and a circuit court judge was available for her arraignment on November 18.[286] Consequently, Swinney argued her statements made on the morning of November 19, after the unreasonable delay and before her initial appearance, were taken in violation of her federal and state right to counsel and therefore suppression was required.[287]

Once more in deciding this issue the court relied upon the United States Supreme Court's decision in *McLaughlin* and Rule 6.03, which together required an arrested person to have an initial appearance within forty-eight hours of arrest, and without unnecessary delay.[288] The court further explained *McLaughlin*'s holding as putting the burden of proof on defendants to show an improper purpose for a delay, such as a delay for the goal of amassing additional evidence, when an initial appearance was held within forty-eight hours of arrest.[289] However, when forty-eight hours elapsed the State had the burden of showing an exigent circumstance for the delay to be considered reasonable.[290]

Further, the court looked to its own precedent involving alleged violations of Rule 6.03 where unnecessary delay was defined "to mean 'as soon as custody, booking, administrative and security needs have been met.'"[291] Also, the court noted that once the administrative needs of law enforcement had been met, the only excusable reason for delay could be the unavailability of a judge to conduct an initial appearance.[292] Therefore, in Mississippi, even if an initial appearance was held within forty-eight hours of arrest, it could still be unconstitutional.[293]

Subsequently, the court noted Swinney's initial appearance was delayed from November 18, to November 19, on request from the District Attorney.[294]

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282. *See id.*
283. *See id.* at 1236-37.
284. *See id.* at 1230-35.
285. *See id.* at 1230 (citing MISS. R. UNIF. CIR. CTY. CT. 6.03).
286. *See id.*
287. *See id.* (citing U.S. CONST. amend. VI; MISS. CONST. art. 3, § 6).
288. *See id.* at 1231.
289. *See id.* (citing County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991)).
290. *See id.* (citing *McLaughlin*, 500 U.S. at 57).
291. *See id.* (quoting Evans v. State, 725 So. 2d 613, 644 (Miss. 1997) (citing Abram v. State, 606 So. 2d 1015 (Miss. 1992))).
292. *Id.* (citing *Abram*, 606 So. 2d at 1029).
293. *See id.* at 1231-32 (citing *Evans*, 725 So. 2d at 644).
294. *Id.* at 1232.

Also, the court explained a judicial officer was available to conduct initial appearances starting November 17, and continued to be available throughout the entire week.[295] Swinney argued these facts showed her appearance was delayed for an improper purpose, although the trial court held the delay was justified so law enforcement could decide whether to bring double murder charges against Swinney.[296]

In agreeing with the trial court's conclusion the supreme court noted Rule 1.04, unlike its successor Rule 6.03, did not require a probable cause determination at an initial hearing.[297] Therefore, the court found *Abram*, in which a violation of Rule 1.04 caused the court to reverse a conviction, to be distinguishable from Swinney's case since Rule 6.03 replaced Rule 1.04 before Swinney's arrest.[298] Furthermore, *Abram* was distinguishable because Abram's initial appearance was delayed seventy-two hours, while Swinney's was only delayed forty-three hours.[299]

In addition, the court explained that the minor delay Swinney suffered was reasonable since officers were trying to determine if double murder charges were appropriate in "an extremely difficult and problematic case."[300] Therefore, the court found Swinney's initial appearance to be held within a reasonable amount of time.[301] Consequently, Swinney was not automatically entitled to counsel before her initial appearance on the morning of November 19, when she made incriminating statements, because the right to counsel attaches at the time an initial appearance should be held.[302]

After determining that Swinney's initial appearance argument would not lead to suppression, the court sought to determine whether Swinney had invoked and waived her right to counsel before making incriminating statements.[303] First, the court determined that Swinney never argued the specific issue of her invoking the right to counsel at trial, and therefore her argument was procedurally barred.[304] Then the court analyzed the issue despite the procedural bar,[305] and found the trial court judge's ruling on admissibility to be a factual finding, which would not be overturned unless the finding was manifestly incorrect or contrary to the significant weight of the relevant evidence.[306] Also, the court found there

295. *Id.*
296. *See id.*
297. *See id.* at 1231, 1232.
298. *See id.* at 1232; *see supra* note 35.
299. *See id.*
300. *See id.*
301. *Id.*
302. *See id.* (citing Jimpson v. State, 532 So. 2d 985, 988 (Miss. 1988) (quoting May v. State, 524 So. 2d 957, 967 (Miss. 1988))).
303. *See id.*
304. *Id.* at 1232-33 (citing Evans v. State, 725 So. 2d 613, 631 (Miss. 1997); Chase v. State, 645 So. 2d 829, 845 (Miss. 1994); Foster v. State, 639 So. 2d 1263, 1270 (Miss. 1994); Cole v. State, 525 So. 2d 365, 369 (Miss. 1987); Irving v. State, 498 So. 2d 305 (Miss. 1986); Johnson v. State, 477 So. 2d 196 (Miss. 1985); *In re* Hill, 460 So. 2d 792 (Miss. 1984); Hill v. State, 432 So. 2d 427 (Miss. 1983)).
305. *See id.* at 1233-35.
306. *See id.* at 1235 (citing Applewhite v. State, 753 So. 2d 1039, 1041 (Miss. 2000)).

was substantial evidence to support the trial court's holding despite the judge's failure to identify a legal standard or apply a legal analysis.[307] Ultimately, the court found no error in the trial judge's decision to deny Swinney's motion to suppress her confession.[308]

In dissent, Chief Justice Pittman, joined by Justice Graves, disagreed with the majority's holding on Swinney's waiver of the right to counsel and would have reversed for a new trial.[309] Justice Pittman provided that Swinney's right to counsel argument was not procedurally barred because her motion to suppress contained sufficient information for the trial court to take notice of this claim along with the unreasonable delay allegation.[310] Further, Pittman noted that the procedural bar was inappropriately applied because the right to counsel is a fundamental right,[311] and violations of such rights are subject to review under plain error.[312] Thereafter, Justice Pittman found Swinney's right to counsel violated because she invoked the right and yet, interrogation by a law enforcement officer continued.[313] According to the Chief Justice, Swinney's incriminating statement, made after an invocation of the right to counsel, was inadmissible.[314]

V. ANALYSIS

The *Swinney* decision is important for two main points. One, a new exception to requiring initial appearances without unnecessary delay was created in the form of determining whether additional charges could be brought against a defendant.[315] Two, the court held that this new exception did not fall under *McLaughlin*'s prohibition against delays for the purpose of gathering evidence to justify an arrest.[316] This second point will likely result in virtually all future *McLaughlin* claims being denied by Mississippi courts where a delay has not exceeded forty-eight hours and the burden is on the defendant to prove unreasonableness.

Consequently, whether the facts of *Swinney* even required an application of *McLaughlin* will be analyzed. Also, whether the court's application of *McLaughlin* was congruent with other courts' decisions involving *Gerstein/McLaughlin* claims will be addressed. Moreover, assuming *McLaughlin* was misapplied and a Fourth Amendment violation occurred, should the exclusionary rule apply to confessions made after probable cause determinations have been unreasonably delayed?

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307. *See id.* at 1235.

308. *See id.*

309. *See id.* at 1237-38 (Pittman, C.J., dissenting).

310. *See id.* (Pittman, C.J., dissenting).

311. *See id.* (Pittman, C.J., dissenting) (citing Beckum v. State, 786 So. 2d 1060, 1062-63 (Miss. 2001)).

312. *See id.* (Pittman, C.J., dissenting) (citing Porter v. State, 732 So. 2d 899, 902-05 (Miss. 1999)).

313. *See id.* at 1237 (Pittman, C.J., dissenting).

314. *See id.* at 1238 (Pittman, C.J., dissenting).

315. *See id.* at 1232. Previously, without unnecessary delay was defined as meaning "'as soon as custody, booking, administrative and security needs have been met.'" Swinney v. State, No. 1999-KA-00031-SCT, 2001 Miss. LEXIS 45, at *13 (Miss. March 1, 2001), *withdrawn and substituted by*, 829 So. 2d 1225 (quoting Evans v. State, 725 So. 2d 613, 644 (Miss. 1997)).

316. *Id.* at 1231-32.

A. The Facts of Swinney *Support an Application of* McLaughlin

As previously noted, the United States Supreme Court's decision in *Gerstein* provided that the Fourth Amendment required judicial findings of probable cause before arrestees could be subject to extended pretrial detention.[317] This holding was later clarified in *McLaughlin* by the addition of a burden-shifting forty-eight hour rule where a presumption of a Fourth Amendment violation would exist when an arrestee's judicial determination of probable cause was delayed in excess of forty-eight hours.[318] However, a Fourth Amendment violation could still occur if a judicial finding of probable cause was made within forty-eight hours of arrest if an individual could prove the judicial finding was nonetheless delayed for an impermissible purpose.[319] Since *Gerstein/McLaughlin* require judicial findings of probable cause prior to extended pretrial detention, those persons arrested pursuant to warrants would not have valid claims under those opinions since arrest warrants represent judicial determinations of probable cause.[320] Therefore, if Swinney was arrested pursuant to a warrant, the Mississippi Supreme Court should not have applied *McLaughlin* to Swinney's unreasonable delay claim.

Unfortunately, whether Swinney was arrested through the use of a warrant is not explicitly provided in the court's opinion. However, two factors point towards the conclusion that she was arrested through law enforcement's on-the-scene determination of probable cause rather than a warrant. First, the time between the commission of the robbery/homicide, Swinney's arrest, and her initial in custody statement does not support a finding of Swinney being arrested through the use of a warrant. Swinney initially entered Don's Pawn Shop around 2:15 p.m., and after being arrested at a roadblock she gave an initial statement to the Captain of the Corinth Police Department at 5:00 p.m. that same afternoon.[321] This period between the commission of the crime and Swinney's arrest was highly unlikely to be long enough for law enforcement to identify her as a suspect and present this information to a judicial officer in order to obtain an arrest warrant. What likely occurred was that the eyewitnesses identifying a slender black man and heavier set person leaving the scene of the crime described to law enforcement the vehicle in which Swinney and her brother made their getaway.[322] Then, roadblocks were set up to stop any vehicle matching the witnesses' descriptions, and at one of these roadblocks Swinney and her brother were stopped and taken into custody.[323]

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317. Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

318. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991).

319. *See id.* at 56.

320. *Cf.* United States v. Van Metre, 150 F.3d 339, 347-48 (4th Cir. 1998) (noting that the defendant's arraignment was delayed in excess of forty-eight hours; but, since the defendant was arrested through the use of a warrant *McLaughlin*'s Fourth Amendment holding was inapplicable); Lawrence v. State, 869 So. 2d 353, 356 (Miss. 2003) (finding no Fourth Amendment violation under *Gerstein/McLaughlin* since an arrest warrant was served the day after an arrest, representing a judicial finding of probable cause).

321. *See* Swinney, 829 So. 2d at 1229-30.

322. *See id.* at 1229.

323. *See id.*

The second factor supporting the conclusion that Swinney was taken into custody through a warrantless arrest comes from the court's discussion of Mississippi's Initial Appearance Rule 6.03.[324] In this context the court was distinguishing the facts of Swinney's pretrial detention from a previous decision where a violation of Rule 1.04, the predecessor to Rule 6.03, resulted in a reversal of a defendant's conviction for capital murder.[325] The court explained that Rule 6.03 now required a judicial officer to make a determination of probable cause, whereas Rule 1.04 did not combine a suspect's initial appearance with a probable cause determination.[326] However, Rule 6.03 *only* requires a judicial determination of probable cause when there has been a warrantless arrest.[327] If Swinney had been arrested pursuant to a warrant no probable cause determination would have occurred during her initial appearance. Therefore, in order for *Swinney* to be distinguishable from *Abram* on this point, Swinney must have been subjected to a warrantless arrest.

Standing alone, neither the time between the commission of the robbery/homicide and Swinney's arrest, nor the court's distinction of Rule 6.03 from 1.04, may conclusively lead to the determination that Swinney was subjected to a warrantless arrest. However, such a conclusion is assured from viewing these two factors together, along with the reasonable presumption that the Mississippi Supreme Court would know *McLaughlin* applies only to warrantless arrests.[328] Therefore, the facts of *Swinney* did support an application of *McLaughlin*'s forty-eight hour rule.

B. The Forty-Three Hour Delay in Swinney's Initial Appearance was a Violation of the Fourth Amendment

The United States State Supreme Court in *McLaughlin* held that a Fourth Amendment violation could occur if a probable cause determination was held within forty-eight hours of arrest, but nonetheless delayed unreasonably.[329] Specific examples of unreasonable delays include "delays for the purpose of gathering additional evidence to justify [an] arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake."[330] However, when deciding unreasonable delay claims not exceeding forty-eight hours, where the burden is on the arrestee to prove unreasonableness, courts should allow for flexibility in recognizing the practical realities causing unavoidable delays.[331] Some of these practical realities include transporting arrestees from and to different

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324. MISS. R. UNIF. CIR. CTY. CT. 6.03.

325. *Swinney*, 829 So. 2d at 1231, 1232 (citing Abram v. State, 606 So. 2d 1015 (Miss. 1992)).

326. *See id.* at 1232.

327. MISS. R. UNIF. CIR. CTY. CT. 6.03 ("*If* the arrest has been made without a warrant, the judicial officer shall determine whether there was probable cause for the arrest and note the probable cause determination for the record.") (emphasis added).

328. *Cf.* Lawrence v. State, 869 So. 2d 353, 356 (Miss. 2003) (finding no Fourth Amendment violation under *Gerstein/McLaughlin* since an arrest warrant was served the day after an arrest, representing a judicial finding of probable cause).

329. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

330. *Id.*

331. *See id.* at 56-57.

facilities, the unavailability of magistrates on late-night bookings, or the unavailability of the arresting officer who could be involved in processing other suspects.[332] This portion of *McLaughlin* was applicable to Swinney's arrest and detention since she was held forty-three hours before being provided an initial appearance.[333]

Besides providing the above-referenced portion of *McLaughlin*,[334] the Mississippi Supreme Court did not seek to determine whether the stated purpose for delaying Swinney's initial appearance fell into one of *McLaughlin*'s prohibitions or allowances for delays not in excess of forty-eight hours. Instead, the court distinguished the facts of Swinney's arrest and detention from a prior opinion in which the court reversed a capital murder conviction, and further noted the delay in Swinney's initial appearance was reasonable given the complexity and difficulty of her case.[335] The justification for delaying Swinney's initial appearance, determining if additional charges could be brought,[336] conflicts with the basic policies behind the United States Supreme Court's decisions in *Gerstein* and *McLaughlin*. Also, an analysis of other precedent involving *McLaughlin* claims should have led the court to reject this purpose as a reasonable justification for delaying Swinney's initial appearance.

The outcome in *Swinney* would have been more persuasive if Fifth Circuit or Mississippi Supreme Court opinions involving actual *McLaughlin* claims were applied to the facts of Swinney's arrest and pretrial detention. In fact, *Thorson v. State*,[337] and *West v. Johnson*,[338] were holdings from those courts where *McLaughlin* claims arising from delays not exceeding forty-eight hours were rejected. However, an in-depth analysis of these two cases reveals their inapplicability to *Swinney* and this may explain why they were not mentioned in the principal decision.

First, in *Thorson*, the defendant's independent determination of probable cause was delayed because of a court administrator's error in scheduling an initial appearance.[339] This is clearly different from the delay in *Swinney* which was intentionally caused by the district attorney's office, for what appeared to be further investigation.[340] Second, the Fifth Circuit's opinion in *Johnson* provided even less of an application of *McLaughlin*'s forty-eight hour rule than the *Swinney* decision. The defendant's inability to show that he was denied an initial appearance within forty-eight hours of arrest was enough for the court to determine no violation had occurred.[341] The portion of *McLaughlin* explaining how Fourth Amendment violations could occur when probable cause determinations

332. *See id.* at 57.
333. *See* Swinney v. State, 829 So. 2d 1225, 1230 (Miss. 2002).
334. *Id.* at 1231.
335. *See id.* at 1231, 1232.
336. *Id.* at 1232.
337. 653 So. 2d 876, 886-87 (Miss. 1995).
338. 92 F.3d 1385, 1404 (5th Cir. 1996).
339. *Thorson*, 653 So. 2d at 886.
340. *See* Swinney v. State, No. 1999-KA-00031-SCT, 2001 Miss. LEXIS 45, at **12-14 (Miss. March 1, 2001), *withdrawn and substituted by*, 829 So. 2d 1225.
341. *See Johnson*, 92 F.3d at 1404.

were delayed within forty-eight hours of arrest was totally ignored. Furthermore, the court noted that "'[e]ven assuming that the time gap between arrest and initial appearance was unreasonable, the claim does not rise to constitutional significance,'"[342] a statement which expressly conflicts with the Supreme Court's holdings in *Gerstein* and *McLaughlin*.[343]

Johnson and *Thorson* were the two cases from the Fifth Circuit and Mississippi Supreme Court with facts most similar to Swinney's arrest and pretrial detention. However, neither opinion should determine the outcome of *Swinney* for the aforementioned reasons. Therefore, other jurisdictions' holdings involving *McLaughlin* claims must be examined in order to determine if the delay in *Swinney* was unconstitutional.

The following four United States Circuit Courts of Appeals' decisions best symbolize the two different approaches other courts have used in applying *McLaughlin* to unreasonable delay claims not exceeding forty-eight hours. One opinion from the Seventh Circuit and an Eighth Circuit decision have found violations of the Fourth Amendment in this context.[344] In *Willis*, the court held that a probable cause determination delayed for the purpose of investigating separate crimes was impermissible under *McLaughlin*.[345] The court reasoned that a delay for the purpose of investigating a separate crime was substantially analogous to a delay for the purpose of amassing additional evidence to support an arrest, a purpose explicitly impermissible under *McLaughlin*.[346] Since both delays allowed law enforcement to question a defendant in custody without a judicial finding of probable cause, the delay for the purpose of investigating other crimes was also a violation of the Fourth Amendment.[347] In *Davis*, the Eighth Circuit found a delay as minor as two hours to violate the Fourth Amendment when the purpose for the delay was to investigate other separate crimes.[348] The court reasoned that although *McLaughlin* allows for flexibility in analyzing inevitable administrative delays, where administrative booking proceedings were never initiated, delays would not be permissible just because they did not exceed forty-eight hours.[349]

Conversely, two Seventh Circuit opinions subsequent to *Willis* have rejected defendants' *McLaughlin* claims arising from delays not exceeding forty-eight hours.[350] In *Daniels*, a forty-hour delay was found not to violate *Gerstein/McLaughlin* because a line-up identification obtained approximately twenty-six hours after an arrest was for the purpose of gathering additional evidence, but not to justify an arrest.[351] The court reasoned that the delay would have violated

342. *Id.* (quoting De La Rosa v. Texas, 743 F.2d 299, 303 (5th Cir. 1984)).

343. *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975); County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991).

344. *See* Willis v. City of Chicago, 999 F.2d 284, 289 (7th Cir. 1993); United States v. Davis, 174 F.3d 941, 946 (8th Cir. 1999).

345. *Willis*, 999 F.2d at 288-89.

346. *See id.* at 289 (citing *McLaughlin*, 500 U.S. at 56).

347. *See id.*

348. *See Davis*, 174 F.3d at 945-46.

349. *See id.*

350. *See* United States v. Sholola, 124 F.3d 803, 821 (7th Cir. 1997); United States v. Daniels, 64 F.3d 311, 314 (7th Cir. 1995).

351. *See Daniels*, 64 F.3d at 313, 314.

Gerstein/McLaughlin only if the line-up identification was used to support the existence of probable cause for Daniel's arrest in an affidavit presented to a judicial officer.[352] In *Sholola*, the Seventh Circuit also denied a defendant's unreasonable delay claim because evidence obtained to justify the defendant's arrest was collected immediately at the time Sholola was placed in custody.[353] Any evidence obtained after Sholola was booked and before his initial appearance was related to separate crimes, distinct from the one he was suspected of committing at the time of his arrest.[354]

There is one major distinction between the way *Willis/Davis* and *Daniels/Sholola* interpreted and applied *McLaughlin*. The courts in *Willis* and *Davis* looked beyond the exact wording of the Supreme Court's opinion and sought to execute the policy rationale behind the decision. On the other hand, the Seventh Circuit in *Daniels* and *Sholola* narrowly interpreted the language in *McLaughlin* in furtherance of other policy justifications. For the following the reasons, the *Willis/Davis* approach is the appropriate method and the Mississippi Supreme Court should have used that analysis to find a violation of Swinney's Fourth Amendment rights.

One, the Supreme Court in *McLaughlin* did not provide an exclusive set of circumstances in which delays less than forty-eight hours could be considered unreasonable.[355] Instead, the Court merely provided "examples" of delays that would violate the Fourth Amendment.[356] Also, the Court provided several examples of unavoidable delays that should lead courts to find against individuals making *Gerstein* claims.[357] A common theme running through the examples of permissible delays is allowing for circumstances beyond law enforcement's control, such as the unavailability of a judicial officer.[358] However, there is no common rationale shared among the examples of impermissible delays.[359] This is made clear by comparing two of these examples: "delay for delay's sake," and delay "for the purpose of gathering additional evidence to justify [an] arrest."[360] Consequently, if an individual can show that their judicial determination of probable cause was intentionally delayed for a purpose not relating to circumstances beyond law enforcement's control, a Fourth Amendment violation should be declared.

This conclusion is congruent with the second reason for favoring the *Willis/Davis* approach of applying *McLaughlin* over the *Daniels/Sholola* method. Namely, the policies behind the Supreme Court's decisions in *Gerstein* and *McLaughlin*, are better furthered by such a holding. Obviously, in order to justify this statement these policies must be identified.

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352. *See id.* at 314.
353. *See Sholola*, 124 F.3d at 819-20.
354. *See id.* at 820.
355. *Cf.* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).
356. *See id.*
357. *See id.* at 56-57.
358. *See id.*
359. *See id.* at 56.
360. *See id.*

Consequently, in *Gerstein* the Supreme Court sought to balance a state's need to limit crime with the rights of citizens to liberty.[361] The needs of law enforcement in preventing escapes and limiting an individual's ability to commit further crimes were said to evaporate once a suspect arrested without a warrant was taken into custody.[362] Conversely, the right of a citizen to an independent finding of probable cause was said to significantly increase once a warrantless arrest had occurred.[363] An individual's financial and familial relations could be severely damaged by prolonged detention.[364] In supplying a ruling to balance these competing interests the Court held the Fourth Amendment required judicial findings of probable cause prior to extended restraints of liberty.[365]

The *Daniels/Sholola* method does not further the above cited policy because using such an approach shifts the balance in favor of law enforcement too far, which naturally results in a sacrifice of individual liberty. This gives law enforcement too much latitude and allows them to take statements from detainees, determine the truthfulness of those statements through investigation, and subsequently confront those accused with any inconsistencies in their statements.[366] Any confessions obtained from this practice would certainly be presented to a judicial officer making a probable cause determination, and a judge would be hard pressed to release a suspect for a lack of probable cause when a confession had been obtained. Also, such an approach does not take into account the coercive effect being in jail can have on most individuals; especially, presumptively innocent persons who have not been provided with an independent determination of probable cause in the form of a warrant prior to arrest.

Conversely, applying a *Willis/Davis* approach to unreasonable delay claims not exceeding forty-eight hours would further the balance between individual liberty and states' needs for effective law enforcement that *Gerstein* sought to achieve. For instance, law enforcement could still investigate and question an individual subject to a warrantless arrest. These actions would be permissible as long as the administrative and booking needs of law enforcement had been met and some action was taken to ensure that a judicial determination of probable cause was forthcoming.

When this balance seeking approach of applying *Gerstein/McLaughlin* is applied to the facts of Swinney's arrest and pretrial detention the justification for her delayed initial appearance cannot be deemed reasonable. Swinney's initial appearance was originally set for Tuesday, November 18, but later moved to November 19, due to a request from the district attorney's office.[367] After this purposeful delay and before Swinney's initial appearance an investigator from

361. *See id.* at 52-53 (citing Gerstein v. Pugh, 420 U.S. 103, 112-14, 125 (1975)).

362. *See Gerstein*, 420 U.S. at 114.

363. *See id.*

364. *McLaughlin*, 500 U.S. at 52 (citing *Gerstein*, 420 U.S. at 114).

365. *See id.* (citing *Gerstein*, 420 U.S. at 125).

366. *Cf.* Swinney v. State, No. 1999-KA-00031-SCT, 2001 Miss. LEXIS 45, at *13 (Miss. March 1, 2001), *withdrawn and substituted by*, 829 So. 2d 1225.

367. Swinney v. State, 829 So. 2d 1225, 1232 (Miss. 2002).

the district attorney's office confronted Swinney with evidence gathered at the crime scene that conflicted with her initial statements made to law enforcement.[368] During this questioning Swinney admitted to accidentally shooting Don Harville in the back, which constituted the only direct proof of her killing the shop owner.[369] The purpose for this delay was characterized as being "necessary to determine whether double murder charges should be brought against Swinney."[370]

How this justification springs forth from the set of facts leading to Swinney's confession is not entirely clear; but, regardless of the characterization, Swinney's rights under the Fourth Amendment were violated. The delay was clearly not for a purpose beyond law enforcement's control.[371] A circuit court judge was available, and the booking, custody, and security needs of law enforcement had been met on November 18.[372] Also, further evidence was gathered after the delay, resulting in a confession which could hardly be viewed as not justifying an arrest.[373] Allowing law enforcement to engage in these types of practices produces a substantial cost. Namely, the deprivation of presumptively innocent individuals' rights to be free from unreasonable seizures as required by the Fourth Amendment of the United States Constitution.[374]

C. A Gerstein/McLaughlin *Fourth Amendment Violation Supports an Application of the Exclusionary Rule*

As previously noted, in *Powell v. Nevada* the United States Supreme Court decided to leave unresolved the question of whether suppression of evidence is the appropriate remedy for a *Gerstein/McLaughlin* Fourth Amendment violation.[375] Also, *Gerstein* and *McLaughlin* did not address this issue since both actions were brought under 42 U.S.C. § 1983, and were not appeals from criminal convictions.[376] However, the failure to provide a judicial determination of probable cause in a timely manner is a Fourth Amendment violation,[377] and the

368. *See Swinney*, 2001 Miss. LEXIS 45, at **13-14.

369. *Swinney*, 829 So. 2d at 1232.

370. *Id.*

371. An argument could be made that law enforcement had nothing to do with delaying Swinney's initial appearance, since the district attorney's office was responsible for her arraignment being postponed. *See id.* However, in the circumstances of this case the district attorney's office was performing the same functions as law enforcement by attempting to implicate Swinney in Harville's death through the questioning of Investigator Dance. *See id.* Furthermore, in explaining why judicial officers and not prosecutors can make probable cause determinations for the issuance of warrants, the United States Supreme Court has noted the responsibility a prosecutor has towards law enforcement is not consistent with that of a detached and neutral magistrate. *See* Gerstein v. Pugh, 420 U.S. 103, 117-118 (1975) (citing Shadwick v. City of Tampa, 407 U.S. 345 (1972); United States v. United States District Court, 407 U.S. 297, 317 (1972)). Therefore, in the context of *Swinney* the term "law enforcement" includes the district attorney's office.

372. *See Swinney*, 829 So. 2d at 1232.

373. *See id.*

374. *See* U.S. CONST. amend. IV.

375. *See* Powell v. Nevada, 511 U.S. 79, 84-85 (1994).

376. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 47 (1991); *Gerstein*, 420 U.S. at 107 n.5.

377. *See McLaughlin*, 500 U.S. at 55-56; *Gerstein*, 420 U.S. at 114.

Supreme Court has held that evidence obtained through such violations is inadmissible.[378]

Moreover, several courts have decided that suppression is the appropriate remedy when evidence is produced from a judicial determination of probable cause being unreasonably delayed.[379] Also, a Rutgers University Associate Professor of Law has argued in favor of using the exclusionary rule in this context.[380] On the other hand, the First and Sixth Circuits have left the remedy issue unresolved after finding *McLaughlin* violations, but denying suppression due to incriminating evidence having been obtained before any unreasonable delays.[381] Although applying Fifth Circuit or Mississippi Supreme Court precedent to this issue would be preferable, such an application is impossible since neither court has found a *McLaughlin* violation in the context of a criminal appeal as of the date this Note was written.

Since the only direct evidence of Swinney shooting Don Harville was obtained after her initial appearance was unreasonably delayed,[382] *Fullerton* and *Forde* would be inapplicable in determining whether suppression was required in *Swinney*. Therefore, a determination will be made as to whether applying the exclusionary rule to Swinney's incriminating statement would serve the rule's main purpose—deterring misconduct on the part of law enforcement.[383] In addition, if the exclusionary rule is found to applicable, the "fruit of the poisonous tree" test shall be applied in order to determine if there was a sufficient causal connection between the Fourth Amendment violation and Swinney's confession.[384]

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378. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

379. *See* Anderson v. Calderon, 232 F.3d 1053, 1071 (9th Cir. 2000) (holding that evidence obtained through a *McLaughlin* violation should be excluded if it could be considered fruit from a poisonous tree); United States v. Leal, 876 F. Supp. 190, 194-95 (C.D. Ill. 1995) (finding suppression of a detainee's statement to be the appropriate remedy for a *Gerstein/McLaughlin* violation); United States v. Onyema, 766 F. Supp. 76, 82-83, 84 (E.D.N.Y. 1991) (excluding evidence obtained through a seventy-eight hour delay, which the court found to violate the Fourth Amendment as applied by *Gerstein/McLaughlin*); *cf.* Kyle v. Patterson, 196 F.3d 695, 696-97 (7th Cir. 1999) (noting in dictum that the suppression of statements obtained during delays in providing probable cause determinations was the usual remedy for *Gerstein/McLaughlin* violations in criminal cases).

380. George C. Thomas III, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U. L. REV. 413, 461 (1986) (arguing for application of the exclusionary rule when *Gerstein* is violated either through law enforcement's failure to bring an arrestee before a judge, or when a judicial officer fails to make a determination of probable cause).

381. *See* United States v. Fullerton, 187 F.3d 587, 591 (6th Cir. 1999) (rejecting exclusion of incriminating evidence as a remedy when a *McLaughlin* violation occurs *after* evidence is secured); United States v. Forde, No. 93-1322, 30 F.3d 127, 1994 WL 390143, at *3 (1st Cir. June 30, 1994) (unpublished table decision) (holding that a Fourth Amendment violation occurred; but, the evidence was obtained *before* any unreasonable seizure and therefore the violation could not retroactively void the prior legal search) (citing United States v. Crews, 445 U.S. 463, 471 (1980)).

382. *See* Swinney v. State, 829 So. 2d 1225, 1232 (Miss. 2002).

383. *See, e.g.*, New York v. Harris, 495 U.S. 14, 20 (1990) (justifying not excluding a confession by explaining how the deterrent effect of such a holding would be minimal); United States v. Leon, 468 U.S. 897, 918-19 (1984) (holding that the exclusionary rule "should not be applied, to deter objectively reasonable law enforcement activity."); Brown v. Illinois, 422 U.S. 590, 599 (1975) (noting the application of the exclusionary rule served the dual purposes of deterring lawless conduct and promoting judicial integrity) (citing Wong Sun v. United States, 371 U.S. 471, 486 (1963)).

384. *See Brown*, 422 U.S. at 601-05 (applying *Wong Sun*'s "fruit of the poisonous tree" test).

Application of the exclusionary rule in *Swinney* would serve to deter misconduct by the district attorney's office, which intentionally delayed Swinney's initial appearance and then sought to obtain additional evidence through the delay.[385] This misconduct could not fall into *Leon*'s "good faith exception,"[386] because the conduct by the district attorney's office was willful and not objectively reasonable in the light of existing federal and state law. As previously noted, Swinney's initial appearance was intentionally delayed for a purpose unrelated to meeting the booking, security, custody, and administrative needs of law enforcement.[387] Therefore, the delay was willful.

Also, this delay occurred in 1997,[388] a full twenty-two years after the Supreme Court's decision in *Gerstein* and six years after *McLaughlin*, in which the Court held that unreasonable delays could lead to Fourth Amendment violations.[389] Furthermore, at the time Swinney's initial appearance was postponed, the Mississippi Supreme Court had held that delays unrelated to booking, security, custody, or administrative needs could be unconstitutional.[390] Surely, a district attorney's office would be aware of this prevailing case law. Consequently, the action taken to delay Swinney's independent determination of probable cause could in no way be characterized as objectively reasonable.[391]

Ultimately, choosing not to deter this type of misconduct will have a grave effect. Namely, law enforcement will be able to take people into custody without warrants and investigate those individuals for up to forty-eight hours while justifying any delay with a carefully worded explanation that does not fall within one of *McLaughlin*'s specific prohibitions. Such detention for investigation has long been held improper by the Supreme Court.[392]

Thus, the "fruit of the poisonous tree" test will be applied to Swinney's statements made after her initial appearance was unreasonably delayed.[393] The Supreme Court has provided four factors to guide courts in making such determinations: "(1) the presence or absence of *Miranda* warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct."[394]

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385. *See Swinney*, 829 So. 2d at 1232; *supra* notes 366-69, and accompanying text.

386. *See Leon*, 468 U.S. at 918-19, 920.

387. *See Swinney*, 829 So. 2d at 1232; *supra* notes 371-72, and accompany text.

388. *Id.*

389. *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975); County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991).

390. *See Swinney*, 829 So. 2d at 1231-32 (citing Evans v. State, 725 So. 2d 613, 644 (Miss. 1997)).

391. An argument could be made for applying the Supreme Court's holding in *New York v. Harris*, where the Court declined to use the exclusionary rule to suppress a defendant's statements made after an illegal arrest. *See* New York v. Harris, 495 U.S. 14, 17 (1990). In fact, Justice Thomas's dissent in *Powell*, relied extensively on *Harris* for his conclusion that suppression was not an appropriate remedy for a *McLaughlin* violation. *See* Powell v. Nevada, 511 U.S. 79, 89-92 (1994) (Thomas, J., dissenting). However, while not resolving the appropriate remedy issue the majority did characterize the constitutional violations in *Harris* and *McLaughlin*, as being distinguishable. *Powell*, 511 U.S. at 85 n.*. As a result, *Harris* should not be relied on for admitting evidence produced by a *Gerstein/McLaughlin* violation.

392. *See McLaughlin*, 500 U.S. at 68 n.3 (Scalia, J., dissenting) (citing *Gerstein*, 420 U.S. at 120 n.21 (citing Mallory v. United States, 354 U.S. 449, 456 (1957)).

393. *Cf.* Brown v. Illinois, 422 U.S. 590, 601-05 (1975) (applying *Wong Sun*'s "fruit of the poisonous tree" test).

394. Anderson v. Calderon, 232 F.3d 1053, 1072 (9th Cir. 2000) (citing Brown v. Illinois, 422 U.S. 590, 603-04 (1975)).

Before making incriminating statements to Investigator Dance, Swinney signed a waiver of rights.[395] Uncontroverted evidence was presented at trial that showed Swinney was literate and that the waiver contained information advising Swinney of "her right to remain silent and have a lawyer present during questioning."[396] Therefore, the first factor in the poisonous tree test weighs in favor of admitting Swinney's confession. But, this factor is in no way conclusive, and the other three factors must be examined since *Miranda* warnings only inform suspects of their Fifth Amendment rights and not their Fourth Amendment rights to be free from unreasonable seizures.[397]

Applying the temporal factor to a *Gerstein* violation should almost always point towards exclusion.[398] This result occurs because the focus is not on the time between illegal arrest and confession, but rather between illegal custody and confession.[399] For instance, while the passage of time in the case of an illegal arrest helps dissipate the effect of a Fourth Amendment violation, the same passage has the opposite effect in cases of illegal detentions.[400] As time goes by the pressure on an incarcerated individual to confess increases, while the government is given more opportunities to exploit the illegal detention.[401]

There is no reason to find in favor of admission when applying this factor to Swinney's pretrial detention. Because her initial appearance was purposefully delayed Swinney had to spend an extra night in jail without having an independent determination of probable cause.[402] This extra time was used by law enforcement to obtain a confession which certainly supported Swinney's arrest.[403] As a result, the second poisonous tree factor supports exclusion.

Likewise, the intervening circumstances factor favors suppression when applied to *Swinney*. From the time Swinney was initially detained on November 17, until she provided incriminating statements on the morning of November 19, no sufficiently intervening circumstance occurred.[404] Unlike the Supreme Court's ruling in *Wong Sun*, where the Court found a defendant's incriminating statement to be free of any poisonous taint due to several days of freedom between illegal arrest and confession,[405] there was no causal break between violation and confession in *Swinney*. The custody in *Swinney* was the cause of the violation, and since the custody continued up until Swinney gave a confession,[406] her statements could be considered "fruit from a poisonous tree."

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395. *Swinney*, 829 So. 2d at 1234.
396. *See id.*
397. *See Brown*, 422 U.S. at 601 n.6, 601-02.
398. *See* Thomas, *supra* note 380, at 460.
399. *See id.* at 458-59.
400. *See id.* (citing *Brown*, 422 U.S. at 604).
401. *See id.* at 459 (citing 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 9.4(a), at 744 (1984); Gloria J. Studdard, *Recent Decision*, 25 EMORY L.J. 227, 241 (1976)).
402. *See* Swinney v. State, 829 So. 2d 1225, 1232 (Miss. 2002); *supra* text and accompanying notes 321-27.
403. *See Swinney*, 829 So. 2d at 1232.
404. *See id.* at 1230.
405. *See* Wong Sun v. United States, 371 U.S. 471, 491 (1963).
406. *See Swinney*, 829 So. 2d at 1230.

A consideration of the last poisonous tree factor, the flagrancy and purpose of the violation, also points towards Swinney's confession being tainted. Again, Swinney's initial appearance was originally set for Tuesday afternoon, but postponed until Wednesday per the district attorney's office.[407] A judge was available for the initial appearance on Tuesday, showing that the booking, custody, security, and administrative needs of law enforcement had been met.[408] Investigator Dance, employed by the district attorney's office,[409] questioned Swinney Wednesday morning in order to present her with evidence which contradicted her initial statements.[410] Then, Swinney confessed to shooting Harville.[411]

Although the delay was described as being justified in order for officers to determine whether to charge Swinney with double murder,[412] the facts listed above do not support such a conclusion. Instead, Swinney's initial appearance and independent probable cause determination appear to have been delayed for investigation. Again, detention for investigation has long been held flagrant by the United States Supreme Court.[413] Therefore, the fourth poisonous tree factor supports exclusion.

As a result, only one factor supports admission, while three support exclusion. Taken as a whole, Swinney's confession has not fallen far enough away from the poisonous tree to be considered untainted. Since the only direct proof of Swinney shooting Harville came from her confession,[414] her conviction should have been reversed and a new trial ordered.[415] Such a finding does not come lightly. If Swinney had been granted a new trial without the admission of her confession into evidence a guilty person might have gone free.[416] However, to hold otherwise would be to sanction an intentional violation of the Constitution that affects those individuals the Fourth Amendment was most designed to protect, the presumptively innocent.[417]

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407. *Id.* at 1232.

408. *See id.*

409. *Id.*

410. *See* Swinney v. State, No. 1999-KA-00031-SCT, 2001 Miss. LEXIS 45, at *14 (Miss. March 1, 2001), *withdrawn and substituted by*, 829 So. 2d 1225.

411. *Swinney*, 829 So. 2d at 1232.

412. *Id.*

413. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 70 n.3 (1991) (Scalia, J., dissenting) (citing Gerstein v. Pugh, 420 U.S. 103, 120 n.21 (1975) (citing Mallory v. United States, 354 U.S. 449, 456 (1957))).

414. *See Swinney*, 829 So. 2d at 1232.

415. *Cf.* Abram v. State, 606 So. 2d 1015, 1029 (Miss. 1992) (finding the failure to provide a timely initial appearance to be reversible error when the delay resulted in a confession that was the entire basis for a conviction).

416. However, even this result is not assured since Swinney's initial statements to law enforcement, made before her initial appearance was delayed, put her at the scene of the crime with her brother Nicholas. *See* Swinney, 829 So. 2d at 1230. These statements could not be excluded as the fruit from a poisonous tree and they alone may have been enough to find her guilty of capital murder as an accomplice.

417. *Cf.* McLaughlin, 500 U.S. at 71 (Scalia, J., dissenting) (explaining how the majority's choice of a forty-eight hour rule instead of a stricter twenty-four hour rule undermined the Fourth Amendment and its common-law bases because presumptively innocent persons could be forced to wait in jail for two full days without the benefit of any prompt, independent determination of probable cause).

VI. CONCLUSION

The Mississippi Supreme Court's holding in *Swinney*, that a forty-three hour detention before an initial appearance was not an unreasonable delay,[418] will likely prevent the success of any Fourth Amendment *Gerstein/McLaughlin* claim in Mississippi where an independent determination of probable cause has been delayed within forty-eight hours of arrest. Post *Swinney*, any delay will be permissible as long as law enforcement can characterize the delay's justification as not falling into one of *McLaughlin*'s specific prohibitions. Also, an individual's right to an initial appearance without unnecessary delay under Mississippi's Initial Appearance Rule 6.03,[419] has been severely negated. Previously, under Rule 6.03 delays were allowed only for administrative, security, booking, and custody needs,[420] or for the lack of a judicial officer to conduct an initial appearance.[421] Now, the easily manipulated, "determining if additional charges can be brought,"[422] has been added as a permissible justification for delay.

Some may welcome this expansion of the government's ability to investigate crime. However, *McLaughlin* and *Gerstein* sought to achieve a balance between society's need for effective law enforcement and an individual's right to liberty, by respectively defining and placing a promptness requirement on judicial determinations of probable cause.[423] The *Swinney* decision upsets this balance by approving the delay of an initial appearance, and consequently a judicial finding of probable cause,[424] for the purpose of investigation.[425] The *McLaughlin* Court explained that delays for the purpose of further investigation were unreasonable,[426] and the *Gerstein* Court noted probable cause was to be developed prior to arrest and not through an interrogation process.[427] Encouraging the detention of the presumptively innocent without an independent determination of probable cause, while evidence is gathered to support the detention, is a procedure which should not be tolerated in a country founded upon liberty and freedom. This practice reduces the Fourth Amendment's prohibition against unreasonable seizures to mere words,[428] and upsets the delicate balance *Gerstein* and *McLaughlin* sought to achieve between the government's need to limit crime with the rights of its citizens to liberty.

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418. *See Swinney*, 829 So. 2d at 1232.

419. MISS. R. UNIF. CIR. CTY. CT. 6.03.

420. *See Swinney*, 829 So. 2d at 1231 (citing Evans v. State, 725 So. 2d 613, 644 (Miss. 1997) (citing Abram v. State, 606 So. 2d 1015 (Miss. 1992))).

421. *See id.* (citing *Abram*, 606 So. 2d at 1029).

422. *See id.* at 1232.

423. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991); Gerstein v. Pugh, 420 U.S. 103, 114, 126 (1975).

424. *See supra* notes 321-27 and accompanying text.

425. *See Swinney*, 829 So. 2d at 1232.

426. *See McLaughlin*, 500 U.S. at 56.

427. *Gerstein*, 420 U.S. at 120 n.21 (citing Mallory v. United States, 354 U.S. 449, 456 (1957)).

428. *Cf.* Mapp v. Ohio, 367 U.S. 643, 648 (1961) (noting how the Fourth Amendment would have no meaning without the deterrent effect of the exclusionary rule in federal prosecutions) (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).